Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN,
Petitioner,

v.

FREDERICK WHITE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the States are required by the Sixth and Fourteenth Amendments to provide effective post-appeal counsel to indigent criminal defendants so that those defendants can challenge the work of their original appellate lawyers after the first-appeal-of-right is finished.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Margaret A. Bagley, Warden of the Mansfield Correctional Institution, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 201 F.3d 743. The opinion of the district court (Pet. App. 25a-27a) is unreported. The report and recommendation of the magistrate judge (Pet. App. 28a-43a)

is unreported. The opinion of the Ohio Supreme Court (Pet. App. 44a-47a) is reported at 647 N.E.2d 787. The opinion of the Ohio court of appeals (Pet. App. 48a-54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2000. The court of appeals denied a petition for rehearing on May 10, 2000. Pet. App. 23a-24a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

3. The relevant provisions of the federal habeas statute, 28 U.S.C. 2254, provide:

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in

custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

4. Rule 26(B)(1) of the Ohio Rules of Appellate Procedure provides in relevant part: "A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."

INTRODUCTION

This petition presents an important question about the Sixth Amendment on which the circuit courts of appeals are now divided. In its published decision in this case, the Sixth Circuit held that criminal defendants have a federal constitutional right to the effective assistance of counsel to raise claims of ineffective-assistance-of-appellate-counsel on their behalf in state courts. That decision will have profound effects on state criminal justice systems in the Sixth Circuit, for suddenly the States there must provide a new round of government-paid and constitutionally-effective legal services

to prisoners who want to keep fighting their convictions after losing a first-appeal-of-right in state court.

While the extension of those free and effective legal services to state prisoners might well be an admirable policy goal for lawmakers, nothing in the Sixth Amendment or this Court's prior decisions suggests that the States are obligated by the words of the Constitution to provide ongoing legal help to prisoners after the first-appeal-of-right is over. Yet that is now the law in the Sixth Circuit, and those prisoners who do not receive that free and effective legal help from their lawyers after the first-appeal-of-right is over may now, like the convicted murderer in this case, claim that the States have deprived them of a constitutional right, thereby perhaps springing open the jailhouse door years after their convictions were affirmed in state court.

That decision now merits review, for it stands squarely at odds with this Court's decisions limiting the reach of the Sixth Amendment (guaranteeing accused persons the assistance of counsel in "all criminal prosecutions") to a criminal defendant's trial and first-appeal-of-right only. Even apart from the expense that this expansion of the Sixth Amendment's scope will impose on the affected States, the decision has now opened a new avenue for state prisoners to secure federal habeas review of defaulted claims, for now when a prisoner's lawyer flouts a State's rules for raising federal constitutional claims in state court after the first-appeal-of-right is finished – as happened here – the prisoner is free to claim in federal habeas that the State had a constitutional obligation to provide him with an effective lawyer to keep fighting on his behalf after the first-appeal-of-right was lost, and so the prisoner cannot be blamed for missing the State's post-appeal deadlines.

That approach shows none of the "respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus," *Coleman v. Thompson*, 501 U.S. 722, 726 (1991), for it recognizes a right to counsel after the first-appeal-of-right, even though Ohio has never recognized such a right in its own statutes, rules or Constitution, and even though no other federal court has ever done so either. Though this Court has in the past "declined to extend the right to counsel beyond the first appeal of a criminal conviction," *id.* at 756, the Sixth Circuit has now stretched the Sixth Amendment's words to recognize that very right – a new open-ended right to a free round of post-appeal litigation for all criminal defendants. Because this errant approach will now let this defendant and those like him in the future undo a conviction because of errors committed by a lawyer *years* after the defendant's trial and first appeal were over – an approach we think is simply not compelled by the Sixth Amendment – we respectfully ask the Court to grant certiorari in this case.

STATEMENT

1. State court proceedings. Respondent Frederick White was convicted and sentenced by an Ohio trial court in 1989 for the crimes of aggravated murder and felonious assault. Those charges stemmed from the shooting death of White's ex-wife as she and a co-worker stepped out of the nursing home where she worked as a nurse's aide. After a jury found White guilty, the state trial court sentenced him to a lengthy prison term.

White appealed (through counsel), raising seven separate challenges to his convictions. Among other claims, he argued that the photo array shown to two witnesses was unduly suggestive, and said that the prosecutor had

improperly introduced some evidence. The Ohio court of appeals shortened White's sentence by vacating one of his two felonious assault convictions, but otherwise affirmed White convictions and sentences. *See* 1991 WL 8581 (January 31, 1991). White did not appeal this decision to the Ohio Supreme Court.

On July 1, 1993, Rule 26(B) of the Ohio Rules of Appellate Procedure took effect. (This same rule gave rise to the procedural default issue resolved last term in *Edwards v. Carpenter*, 120 S. Ct. 1587 (2000)). The relevant portion of that rule is reproduced on page 3 of this petition. The Ohio Supreme Court adopted that rule after holding that in Ohio, a claim of ineffective assistance of *appellate* counsel must be raised not in a state trial court, but rather through an application for reconsideration filed in the state court of appeals. *State v. Murnahan*, 584 N.E.2d 1204 (Ohio 1992). The 1993 rule, which still governs ineffective-assistance-of-appellate-counsel claims in all non-capital criminal cases in Ohio, gives defendants 90 days – starting with the date on which the court of appeals files its judgment in the defendant's original state-court direct appeal – to raise such ineffective-assistance claims.

On February 16, 1994 – over seven months after the new 90-day rule took effect, and over three years after the Ohio court of appeals had completed its review of his case – White (through new counsel) filed a Rule 26(B) ineffective-assistance-of-appellate-counsel claim with the Ohio court of appeals. White alleged that his appellate counsel in his original appeal in 1989-91 had provided ineffective assistance by failing to describe various challenges to his convictions as *federal* constitutional claims. White's Rule 26(B) application cited various trial-court errors, such as prosecutorial misconduct and the improper admission of

other-acts evidence, hearsay statements and extrinsic evidence, and argued that his original appellate counsel had not effectively pressed those issues in the first appeal, because while the original lawyer had raised all of those claims, he had framed them as violations of state law, rather than federal law.

As for the untimeliness of the Ohio Rule 26(B) ineffective-assistance-of-appellate-counsel claim, White's new counsel explained in an affidavit accompanying the Rule 26(B) application that he had been assigned to White's case in 1991 after White lost his appeal in the state court of appeals, but the heavy workload of the state public defender's office – where White's new lawyer worked – had prevented him from filing the Rule 26(B) application until February 1994. Pet. App. 9a, 49a.

On October 19, 1994, the state court of appeals dismissed White's Rule 26(B) application, finding that White had missed the 90-day window for filing such a claim once that rule took effect on July 1, 1993. Pet. App. 48a-54a. The appeals court found that White's reason for filing a late request to reopen his direct appeal – the heavy workload of his post-appeal counsel – was not "good cause" for his untimely application in 1994. Pet. App. 50a. (The Ohio rule allows state prisoners to file after the 90-day deadline, but only if they show "good cause" for running late.)

In addition, the state court of appeals concluded that White's application, even had it been timely filed, raised claims that his original appellate lawyer had already properly raised in White's original appeal. All of those claims – from the other-acts evidence, to the hearsay statements, to the extrinsic evidence used to impeach White's character, to the claim of prosecutorial misconduct – had been raised by

White's original appellate counsel, and had been addressed in the 1991 opinion of the court of appeals. White's ineffective-assistance-of-appellate-counsel claim was therefore barred not only by the Rule 26(B) provision requiring that it be filed much sooner than it had been, but also by the doctrine of *res judicata*, and the state court of appeals explained both reasons for dismissing White's Rule 26(B) application in its 1994 decision doing just that. Pet. App. 50a-52a.

White appealed, but the Ohio Supreme Court affirmed the dismissal of his Rule 26(B) application in a one-sentence *per curiam* opinion, citing the "reasons stated in [the court of appeals's] opinion." Pet. App. 45a. This Court then denied White's petition for certiorari. *White v. Ohio*, 516 U.S. 892 (1995).

2. Federal habeas proceedings. On December 27, 1995, White filed a petition for a writ of habeas corpus under 28 U.S.C. 2254 in federal district court. He alleged four grounds for habeas relief: prosecutorial misconduct at his trial, the improper admission of other-acts and extrinsic evidence, the improper admission of hearsay statements, and the ineffective assistance of his appellate counsel. As part of that fourth claim, White argued that Ohio's method for raising an ineffective-assistance-of-appellate-counsel claim is unconstitutional.

A U.S. magistrate judge determined that White had procedurally defaulted his claims by failing to appeal to the Ohio Supreme Court once he lost his original direct appeal in the state court of appeals in 1991, and by failing to comply with the 90-day requirement for raising his ineffective-assistance claim under Ohio Appellate Rule 26(B) in 1993-94. Pet. App. 36a-38a.

Applying the cause and prejudice test to those defaults, the magistrate judge refused to treat the heavy workload of White's counsel in the state public defender's office from 1991 to 1994 as the kind of "objective factor external to the defense," Pet. App. 41a, quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986), that could excuse White's failure to comply with Ohio's deadlines for seeking discretionary review in the Ohio Supreme Court of an adverse judgment, or for raising an ineffective-assistance-of-appellate-counsel claim under Rule 26(B). Absent a showing of cause for the default of White's habeas claims, the magistrate judge recommended that all of those claims be dismissed as procedurally barred. Pet. App. 42a.

The district court adopted the magistrate judge's recommendations in full on August 14, 1997, dismissing White's habeas petition because he had procedurally defaulted on his claims in state court, and could not show cause for the defaults. Pet. App. 26a.

White appealed. On January 26, 2000, the Sixth Circuit held that Rule 26(B) was "clearly applicable" to White's claims, Pet. App. 12a – he had argued otherwise because the rule did not take effect until two years after his direct appeal had ended in 1991 – and the Sixth Circuit also concluded that Ohio's state courts had relied on White's failure to comply with that rule's 90-day deadline as the reason for denying his claims. *Id.* at 13a-14a.

Even so, the Sixth Circuit concluded that White could show cause for his procedural default, because the heavy workload of his new lawyer excused White's failure to meet the 90-day deadline in Ohio's Rule 26(B), according to the Sixth Circuit. *Id.* at 17a. Acknowledging that state prisoners have no right to counsel during state post-conviction

proceedings, the Court treated Ohio's Rule 26(B) procedure not as a post-conviction process, but rather as a "continuation of activities related to the direct appeal itself." *Id.* at 19a.

Therefore White, according to the Sixth Circuit, had a constitutional right to the assistance of counsel in filing his Rule 26(B) application in 1993-94 challenging the work of his original appellate lawyer in 1989-91. "The failure of the Ohio Public Defender to offer such constitutionally-mandated counsel excuses the failure of the petitioner to abide by the timing requirements of the applicable procedural rules." *Id.* at 19a. The court of appeals then remanded White's habeas case to the district court, directing that court to consider whether White had been prejudiced by his state-court procedural default of the ineffective-assistance claim, and if so, to review and grant habeas relief on the merits of that claim. The court of appeals has stayed issuance of the mandate in the case pending this Court's action on this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The court of appeals, despite this Court's express decisions holding otherwise, has created a new constitutional right to the effective assistance of counsel in state post-conviction proceedings, and has now allowed the errors of post-conviction counsel to excuse in federal habeas a prisoner's failure to comply with a State's independent and adequate procedural rule for presenting post-conviction claims in state court. Badly misreading and misapplying this Court's precedents of the past two decades, the court of appeals has opened a new avenue for state prisoners to secure federal review of defaulted claims, despite the failure of their state post-conviction lawyers to comply with state procedural rules.

That decision will allow prisoners (and their post-conviction lawyers) to flout the States' rules, and then run to federal court and there raise the defaulted claims anew, despite having "deprived the state courts of an opportunity to address those claims in the first instance." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). The court of appeals has, in short, reached the merits of a federal constitutional claim in habeas that this Court could not reach on direct review, for undeniably Ohio's state courts dismissed the ineffective-assistance claim in this case on state procedural grounds rather than on the merits. No other court of which we are aware has previously suggested that the missteps of state-court post-conviction counsel can revive a claim that was defaulted during a prisoner's collateral attack on his conviction – when he had no right to a lawyer at all – and surely this Court has never done so.

Though Frederick White, the habeas petitioner in this case, procedurally defaulted his ineffective-assistance-of-appellate-counsel claim, the Sixth Circuit has now revived that claim, letting White's lawyer point to the lawyer's own heavy workload as his excuse for missing the deadline to collaterally attack the final judgment entered in White's direct appeal. That decision "ignores the State's legitimate reasons for holding the prisoner," and, if left to stand, "offers state prisoners whose custody [i]s supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws." *Coleman*, 501 U.S. at 731-32. Review by this Court is therefore warranted, for the decision of the court of appeals runs counter to this Court's own long-settled precedents, and is also inconsistent with the approach followed by every other court of appeals that has considered whether errors committed by a criminal defendant's counsel

can serve as cause for a procedural default when those attorney errors were committed long after the prisoner's first-appeal-of-right was finished.

1. The Sixth Circuit's decision is inconsistent with *Coleman*. The court of appeals at least agrees that the States are permitted to enforce a host of procedural rules to regulate their criminal trials and appeals. As this Court has said, such rules "serve vital purposes at trial, on appeal, and on state collateral attack," *Murray v. Carrier*, 477 U.S. 478, 490 (1986), for they "channel[], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Reed v. Ross*, 468 U.S. 1, 10 (1984).

And all can agree as well that federal habeas petitioners who have not complied with those State rules may nonetheless secure federal habeas review of a constitutional claim by showing both "cause" for and "prejudice" from the procedural default as described in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and its progeny. Even further, the Court has already held that constitutionally ineffective assistance of counsel may serve as cause for the procedural default of a habeas claim – as long as the prisoner had a constitutional right to the assistance of counsel at the stage of proceedings where the ineffective lawyer made his misstep. *See Carrier*, 477 U.S. at 489 ("a claim of ineffective assistance . . . may be used to establish cause for a procedural default").

But the Court has never said, as did the court of appeals in this case, that state prisoners have a "federal constitutional right to effective assistance of counsel" to challenge the work of their original appellate lawyers. Pet. App. 22a. This purported constitutional right is now one that appears to apply only in the Sixth Circuit, for we are aware of

no other federal circuit court that has recognized a similar right in other States. When a state prisoner's "constitutionally-mandated counsel" in the Sixth Circuit fails "to abide by the timing requirements of applicable procedural rules" for raising a collateral attack on the work of the prisoner's original appellate lawyer in the first-appeal-of-right, *id.* at 19a, that post-appeal attorney error may now serve as the cause for the prisoner's procedural default in his State's courts in the four States of the Sixth Circuit, even though state prisoners in *other* circuits, like all federal prisoners, cannot force the government to provide them with the same "constitutional" right to a new lawyer after the first-appeal-of-right is lost.

This newly-minted constitutional right for state prisoners to an extra round of government-provided effective counsel after the first-appeal-of-right has ended has no roots in any decisions of this Court. Indeed, the Court has said just the opposite, explaining that state prisoners have no constitutional right to the effective assistance of counsel at all once their first-appeal-of-right is finished. *See Coleman*, 501 U.S. at 756 ("We held in *Ross [v. Moffitt*, 417 U.S. 600 (1974),] that neither the fundamental fairness required by the Due Process Clause nor the Fourteenth Amendment's equal protection guarantee necessitated that States provide counsel in state discretionary appeals where defendants already had one appeal as of right."); *id.* ("Similarly, in [*Pennsylvania v.*] *Finley*, [481 U.S. 551 (1987),] we held that there is no right to counsel in state collateral proceedings after exhaustion of direct appellate review.").

White's first-appeal-of-right ended in 1991 when the state court of appeals affirmed his convictions – long before the attorney error and delay at issue here took place in 1993-94 when White and his new post-appeal lawyer defaulted on

the Rule 26(B) deadline. Yet under the Sixth Circuit's *reading* of the Constitution, White's Sixth Amendment right to effective-counsel-at-state-expense continued long after the state court of appeals affirmed his convictions in 1991, and entitled him to a better lawyer than the one who represented him after he lost that first-appeal-of-right. That decision goes well beyond anything we find in the Sixth Amendment, and seems to read that provision as requiring that prisoners always be given a new lawyer to challenge the work of their last one – a perpetual loop without end.

2. Under the guise of interpreting state law, the court of appeals has significantly expanded the Sixth Amendment right to counsel. White will surely respond with an argument that the Ohio Appellate Rule 26(B) process is part and parcel of the first-appeal-of-right (as the Sixth Circuit determined in this case), that he is of course entitled by the Sixth Amendment to a lawyer throughout the first-appeal-of-right, and therefore the Sixth Circuit's holding that he was entitled to the assistance of an effective lawyer in filing a timely Rule 26(B) application is neither remarkable nor path-breaking. He will say that we improperly characterize the Rule 26(B) process as "post-conviction" or "post-appeal," rather than as part of the first-appeal-of-right itself.

He is wrong. It is true, of course, that we view the Rule 26(B) process (under which state prisoners can raise ineffective-assistance-of-appellate-counsel claims) as a post-conviction proceeding, but only because the Ohio Supreme Court – which wrote the Rule – has done so. *See State v. Robinson*, 660 N.E.2d 472 (Ohio 1996) (calling the Rule 26(B) process a "civil, post-conviction matter"); *State v. Sproat*, 656 N.E.2d 342 (Ohio 1995) (same). The Ohio Supreme Court's own rules for appeals in that Court

reinforce the point, referring to "appeals involving postconviction relief, including appeals brought pursuant to . . . App. R. 26(B)." Rule II, Sec. 2(A)(4)(b) of the Ohio Supreme Court's Rules of Practice.

If Ohio's or any other State's process through which state prisoners can challenge the work of their original appellate lawyers is itself part of the first-appeal-of-right, why is it that no State, including Ohio, has ever been required – by the Constitution, by the federal courts, or by state rules or state courts – to provide effective counsel to state prisoners during that process, until now? The Sixth Circuit, inventing this new constitutional right out of whole cloth, has now called into question every state appellate-court judgment affirming a criminal conviction over the past several decades, for until now, no State has ever thought it had a constitutional obligation to provide a new constitutionally-effective lawyer at state expense to every state criminal defendant whose conviction is affirmed in the first-appeal-of-right. Neither Ohio nor any other State has taken on that expensive and burdensome duty of providing two free sets of appellate lawyers to every indigent prisoner (with the second lawyer expressly charged with the duty of challenging the work of the first), yet that is the very result compelled by the Sixth Circuit's decision.

And where will this new constitutional right end, for if this new "constitutionally-mandated counsel," Pet. App. 19a, likewise fails to provide effective assistance to the prisoner, does the Constitution mandate that a third appellate lawyer be provided to the prisoner to challenge the work of the first two? That third layer of constitutionally-mandated appellate lawyering for every prisoner does not seem warranted by the Sixth Amendment, but then neither did that second layer until the Sixth Circuit so decreed.

The Sixth Circuit has simply invented a new constitutional right where none exists. This Court has long-since rejected the argument that state prisoners are entitled to the assistance of counsel in civil, post-conviction proceedings. *See Coleman*, 501 U.S. at 755; *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion); *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987). The approach of the court of appeals is squarely at odds with those decisions, and simply cannot be reconciled with *Coleman* in particular, where, as here, the state prisoner argued "that it was his attorney's error that led to the late filing of his state habeas appeal." *Coleman*, 501 U.S. at 752. Rejecting that argument, the Court explained that because "[t]here is no constitutional right to an attorney in state post-conviction proceedings . . . this case is at an end," for "counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation." *Id.* at 752, 755. That is, the very argument advanced by the prisoner here and adopted by the court of appeals – that the errors of state post-conviction or post-appeal counsel may excuse a prisoner's procedural default in state court – was expressly rejected by the Court in *Coleman*.

While this Court declined in *Coleman* to "answer . . . broadly" the question whether there is a right to counsel in those post-conviction proceedings that offer a prisoner his *first* opportunity to raise a constitutional claim in state court, *Coleman*, 501 U.S. at 755, and while other courts of appeals that have addressed that question have uniformly declined to create any such exception to *Finley*,[1] the court of appeals in

[1] *See, e.g., Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1100 (1998); *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992); *Bonin v. Vasquez*,

this case never even considered the question reserved in *Coleman*, and instead ruled contrary to the holding of *Coleman* itself, for the Sixth Circuit's opinion suggests that *any* errors of counsel after the first-appeal-of-right is over can excuse a state-court procedural default in state post-appeal proceedings, whether the prisoner enjoyed earlier state-court opportunities in his direct appeal to raise the claim or not.

In holding that White could show "cause" for his failure to comply with the 90-day deadline in Rule 26(B) for raising his ineffective-assistance claim in Ohio's courts (by pointing to "the failure of his attorney to file that pleading in compliance with the rule," Pet. App. 17a), the court of appeals simply ignored this Court's language in *Coleman*: "Attorney ignorance or inadvertence [committed after the state court of appeals has resolved the prisoner's first-appeal-of-right] is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error [that results in a procedural default].'" *Coleman*, 501 U.S. at 753, quoting *Carrier*, 477 U.S. at 488. "Given that a criminal defendant has no right to counsel beyond his first appeal in pursuing state discretionary or collateral review . . . any attorney error [committed during state collateral proceedings] that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas." *Coleman*, 501 U.S. at 757.

3. Other courts of appeals have resolved the question differently. No other court of appeals has allowed an attorney error to serve as cause for a procedural default when that attorney error was committed by a new post-appeal

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999 F.2d 425, 429-30 (9th Cir. 1993); *Hill v. Jones*, 81 F.3d 1015, 1025-26 (11th Cir. 1996), *cert. denied*, 519 U.S. 1119 (1997).

attorney *after* the state court of appeals had already resolved the prisoner's first-appeal-of-right, and likewise, no other court of appeals has allowed the errors of attorneys whom the State has always treated as post-conviction counsel to excuse a state-court procedural default. *See, e.g., Weeks v. Angelone*, 176 F.3d 249, 273 (4th Cir. 1999) ("For an attorney error to constitute cause . . . a petitioner must first possess a constitutional right to assistance of counsel, [and] . . . a petitioner has no constitutional right to assistance of counsel in state habeas proceedings."), *aff'd. on other grounds*, 120 S. Ct. 727 (2000); *Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir. 1999) ("The law is well-established . . . that such error [by state post-conviction counsel] committed in a post-conviction application, where there is no constitutional right to counsel, cannot constitute cause."), *cert. denied*, 120 S. Ct. 29 (1999); *Steward v. Gilmore*, 80 F.3d 1205, 1212 (7th Cir. 1996) ("Ineffective assistance of postconviction counsel is not itself a cognizable federal constitutional violation and may not serve as cause for a procedural default."); *Rehbein v. Clarke*, 94 F.3d 478, 484 (8th Cir. 1996) ("it is now well settled that there is no constitutional right to an attorney in state postconviction proceedings. . . . [so] even if Rehbein's postconviction counsel was ineffective . . . Rehbein has failed to demonstrate adequate cause for his procedural default"); *Ortiz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998) (rejecting claim that a procedural default was caused by the ineffective assistance of counsel in a post-conviction proceeding, because ineffective assistance can "only constitute cause if it amounts to an independent constitutional violation," and "there is no constitutional right to an attorney in a state or federal habeas proceeding"), *cert. denied*, 119 S. Ct. 1777 (1999); *Demarest v. Price*, 130 F.3d 922, 941 (10th Cir. 1997) ("ineffective assistance of counsel in the post-conviction proceedings does not constitute cause under federal law"); *Tower v. Phillips*, 7

F.3d 206, 211 (11th Cir. 1993) ("an attorney's failure to institute timely collateral proceedings cannot excuse a procedural default").

And, like the Ohio Supreme Court, which has rejected the argument that the heavy workload of a state public defender's office can excuse a prisoner's procedural default in state post-conviction proceedings, *see State v. Wilson*, 684 N.E.2d 1221, 1222 (Ohio 1997) ("[t]hat counsel was 'busy' with other cases does not constitute good cause for the delayed filing"), so federal courts have likewise dismissed that excuse as the cause for a state-court procedural default. *See Fairman v. Anderson*, 188 F.3d 635, 643 (5th Cir. 1999) (where post-conviction counsel "failed to act or otherwise inadvertently allowed deadlines to pass," the habeas petitioner "demonstrates no external impediment – necessary to show 'cause' – that prevented his counsel from constructing or raising his claims"); *Tredway v. Farley*, 35 F.3d 288, 295-96 (7th Cir. 1994) (describing the heavy-workload-as-cause excuse as "squarely foreclosed"), *cert. denied*, 513 U.S. 1129 (1995); *Bannister v. Delo*, 100 F.3d 610, 624 (8th Cir. 1996) ("post-conviction counsel's case load, which allegedly was heavy and prevented him from devoting more time to this case . . . [does] not establish[] cause"), *cert. denied*, 521 U.S. 1126 (1997).

In short, the court of appeals has departed from the uniform course set by this Court and followed by all other lower courts in the wake of *Coleman*. Though "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it," *Coleman*, 501 U.S. at 751 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)), that principle will now mean little

in the Sixth Circuit when the States there try to set deadlines for the "timely assertion" of ineffective-assistance claims in state court, for now whenever a prisoner misses such a deadline, he can argue that he had a "constitutionally-mandated" right to have a new post-appeal lawyer raise the claim on time for him. Such an expansive view of the Sixth Amendment right to counsel – a view so at odds with this Court's express decisions to the contrary – undercuts the States' authority to enforce their procedural rules, makes a mockery of the States' "important interest in [the] finality" of their appellate-court judgments, *Coleman*, 501 U.S. at 750, and tramples on the "concerns of comity and federalism . . . [that underlie] the independent and adequate state ground doctrine." *Id.* at 730.

4. The decision of the court of appeals will eviscerate this Court's decision in *Edwards v. Carpenter.* Just months ago, this Court held that any state prisoner who defaults on a state-court deadline for raising an ineffective-assistance-of-counsel claim in state court must show cause for and prejudice from that default before he may offer the defaulted ineffective-assistance claim itself as the cause for the state-court procedural default of some other constitutional claim. *See Edwards v. Carpenter*, 120 S. Ct. 1587, 1591-92 (2000). As the Court said in *Edwards*, that conclusion "flows irresistibly from [the Court's] precedents." *Id.* at 1592 n.3.

Yet the *Edwards* requirement that a prisoner show cause in federal habeas for an earlier state-court default of an ineffectiveness claim is now a toothless procedural barrier in the Sixth Circuit, for the court of appeals has now decreed that a prisoner *always* enjoys a federal constitutional right to a new and effective lawyer after the first-appeal-of-right is finished. That new "constitutionally mandated" lawyer will presumably never default on a State's deadline for raising an

ineffective-assistance-of-appellate-counsel claim concerning the work of the prisoner's original appellate lawyer (and if that post-appeal lawyer *does* so default, then apparently, the prisoner will have yet another Sixth Amendment ineffectiveness claim to lodge against *him*).

Under the decision below, every state prisoner can show cause for his default of an ineffective-assistance-of-appellate-counsel claim (like the claim in *Edwards*) – and so no state prisoner need ever comply with state-court deadlines for raising such a claim – because every prisoner can now blame the tardiness of his ineffective post-appeal lawyer (or blame the State's failure to provide a post-appeal lawyer in the first place) as his excuse for missing state-court deadlines for raising the ineffective-assistance claim in the State's courts. That result makes illusory the cause-and-prejudice standard applied to the defaulted ineffective-assistance claim in *Edwards*, for now *every* prisoner who similarly defaults can automatically show cause, thereby opening up for further federal habeas review a host of claims that were never "presented in the manner that state law requires." *Edwards*, 120 S. Ct. at 1592. That aberrant approach now merits review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN,
Petitioner,

v.

FREDERICK WHITE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-4066

FREDERICK WHITE,
Petitioner-Appellant,

v.

JAMES SCHOTTEN, WARDEN
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 95-02801 – Patricia A. Gaughan, District Judge.

Argued: June 10, 1999

Decided and Filed: January 26, 2000

Before: KEITH, DAUGHTREY, and MOORE, Circuit Judges.

COUNSEL

ARGUED: Kort W. Gatterdam, PUBLIC DEFENDER'S OFFICE, OHIO PUBLIC DEFENDER COMMISSION, Columbus, Ohio, for Appellant. Stuart W. Harris, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS

LITIGATION SECTION, Columbus, Ohio, for Appellee. **ON BRIEF:** Kort W. Gatterdam, PUBLIC DEFENDER'S OFFICE, OHIO PUBLIC DEFENDER COMMISSION, Columbus, Ohio, for Appellant. Stuart W. Harris, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS LITIGATION SECTION, Columbus, Ohio, for Appellee.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. Petitioner Frederick White appeals the district court's dismissal of his habeas corpus petition, filed pursuant to 28 U.S.C. § 2254. In the petition, White challenges his 1989 state convictions for aggravated murder with a firearm specification, felonious assault with a firearm specification, and possession of a weapon under disability, alleging that his appellate counsel rendered constitutionally ineffective assistance. The district court dismissed the petition on the ground of procedural default, finding that the petitioner had failed to raise the issue of ineffective assistance of counsel within the time limit set by Ohio App. R. 26(B). The district court further found that White was unable to show cause and prejudice for the default.

Under applicable Ohio law, a claim of ineffective assistance is raised by application to reopen the direct appeal. Rule 26(B) provides that the application must be filed within 90 days "from journalization of the appellate judgment." In this case, the petitioner's attorney filed the application some three years after the 90-day period had run. Because an application for reopening the direct appeal in Ohio is part of the direct appeal process, and because a defendant has a right to effective assistance of counsel during that stage of

proceedings, we conclude that the petitioner in this case is able to show cause for his procedural default, i.e., counsel's failure to file a timely application for reopening. However, the issue of whether the petitioner was prejudiced by the alleged constitutional error was not addressed by the district court and is not adequately briefed before us. Hence, we must remand the case to the district court to make that determination and, if it finds that the petitioner has established prejudice, to review the petitioner's constitutional claims on their merits.

PROCEDURAL AND FACTUAL BACKGROUND

The convictions underlying Frederick White's federal petition for habeas corpus arise from the shooting death of his former wife, Kimberly Hawkins White, as she left work. The Ohio Court of Appeals, affirming the petitioner's convictions and sentence on direct appeal, stated the facts of this case as follows:

> [Kimberly Hawkins] White worked as a nurse's assistant at the Mount St. Joseph Nursing Home. At approximately 7:00 a.m., November 5, 1988, White left the nursing home with Jacqueline Glenn and walked toward the van of Richard Gibson, a friend of Glenn's, who was to drive the women home. Glenn testified she entered the van through the front passenger door and, as she began to unlock the rear sliding door, White screamed and pushed Glenn into the van. The women fell onto the floor between the seats. Glenn heard an initial shot and heard White shout, "Wait, Rick, wait." (Tr. 110). According to Glenn, this shot hit White in the leg. Glenn told the jury White's assailant entered the van and again shot White, who stated "Oh, Rick." (Tr. 113). Glenn, who

received powder burns during the shooting, testified she heard three to four shots. She also observed the man's face as he left the van.

In her statement to police immediately after the shooting, Glenn indicated she did not see the man who shot White, nor did this statement include White's identification of her assailant. Two days later, Glenn went to the police station to amplify her initial statement. She then told police of White's references to her assailant as "Rick" and described the man's clothing. Glenn subsequently selected the defendant's picture from an array of five photographs and identified him as the man who shot White.

Richard Gibson, the driver of the van, corroborated Glenn's testimony but was unable to identify the assailant. Gibson told the jury that, as White lay wounded in the van, she stated her husband fired the shots. Euclid police officer Jeffrey Swider responded to the nursing home minutes after the shooting. Swider testified he asked White who shot her and White responded, "My husband." (Tr. 180). Sister Mary Raphael, a nun at the nursing home, also heard White identify her husband as the assailant. White later died in the hospital.

Cuyahoga County Coroner Elizabeth Balraj performed an autopsy on White's body. Her examination revealed a gunshot wound to the left leg as well as an abdominal wound with a perforation of the aorta. Balraj opined White hemorrhaged to death. Barbara Campbell, a member of the coroner's trace evidence department, testified that gun shot residue on White's palms indicated the weapon was fired in close proximity to White.

Kathy Kozel, an assistant at Mount St. Joseph, testified that, as she arrived for work, she observed a man standing outside the nursing home approximately ten minutes before the shooting. Kozel stated she was 12-13 feet from the man and that she looked at his face. Kozel did not see the man fire a gun. Three months later, Kozel selected the defendant's photo from an array as the man she saw outside the nursing home.

Charon Hawkins, the victim's daughter, testified the defendant telephoned her mother the evening before she was killed. According to Hawkins, her mother twice refused to speak with the defendant, who finally threatened "to do something bad" to her mother. (Tr. 235). The daughter also averred the defendant beat her mother many times.

Vivian Faylor Jeff, a counselor at the Cuyahoga County Witness & Family Violence Center, testified she met with White on six to eight occasions and that White was afraid of the defendant. Jeff indicated White had filed a complaint against the defendant and sought a protective order and divorce from him. Mabel Jean Edwards, also a nursing home employee, told the jury she discussed White's domestic problems with the defendant. Edwards averred she "often" saw White with black eyes and bruises on her neck. According to Edwards, White told her the defendant once shot at her and a friend.

Euclid police officer Patrick Lynch testified the defendant's auto was found north of Columbus on the northbound side of Interstate I-71 at 2:14 a.m. the day after the shooting. The left rear tire on the vehicle was flat. Lynch told the jury that highway patrol reports

from the previous day did not refer to the auto. In February 1989, police arrested the defendant in California and brought him back to Cleveland for trial.

The defendant denied killing his former wife and told the jury he was in Columbus at the time of the shooting. He claimed he spent the late afternoon of November 4, 1988 with his current wife, Kimberly Fox White, until she went to work that night. According to the defendant, he left for Cleveland at 7:00 p.m. to visit relatives after learning about the death of an uncle. The defendant stated his auto had a flat tire on Interstate 71 just outside Columbus and he walked to a nearby convenience store to phone for assistance. Unable to secure towing services, the defendant went to a laundromat/restaurant named "Dirty Dungarees" where he met a woman, Rhonda Simon. The defendant introduced himself to her as "Tony Love", a name he used as a radio disc jockey. The woman later drove him to his apartment where she left her telephone number on a magazine. The magazine was introduced into evidence. The defendant gave Simon a record album for bringing him home. The defendant testified that, after Brown left, a neighbor, Andrea Bell, visited him. The defendant asked her to order a pizza for him from her apartment since his telephone was not working.

According to the defendant, he and his wife later tried to retrieve his auto but the battery was dead. They spent the rest of the evening watching videotaped movies. The defendant told the jury he awoke the morning of the slaying at 8:15 and went on errands with his wife. He claimed that, as he left the

apartment complex on errands, he spoke with Bell about the pizza not arriving the previous night. Later that day the defendant learned his former wife had been killed. He acknowledged he left for California after police visited his mother in Cleveland. The defendant stated the police told his mother they would shoot him.

Rhonda Simon corroborated the defendant's testimony as to meeting "Tony Love" at 8:00 p.m. on November 4, 1988 at "Dirty Dungarees." She verified that he told her of his flat tire and that she drove him to his apartment where she left her phone number on a magazine. Simon averred she arrived at her house at approximately 10:00 p.m. Andrea Bell also agreed she visited the defendant at his apartment "on a Friday evening in early November" and learned of his flat tire. According to Bell, she spoke with the defendant the next morning between 8:30 and 9:00 as he left the apartment complex with his wife in her auto. Kimberly Fox White corroborated the defendant's testimony and claimed he was with her in the early morning hours of November 5, 1988.

Private investigator John Younkin told the jury that the distance from defendant's auto on Interstate 71 to the nursing home where White was shot equaled 139.3 miles. According to Younkin, it requires two hours and nineteen minutes to drive this distance at the posted speed limits.

The defendant offered two character witnesses on his behalf. Glenn Frazier, a pastor at the Gospel Palace Church and manager of a radio station where defendant hosted an inspirational program, testified to the defendant's honesty. Bishop F.E. Perry stated the

> defendant had been a minister at their church and was a "family" man. Perry described the defendant as truthful.
>
> In rebuttal, the state called Deborah Brown who swore she spoke with the defendant in Cleveland on the afternoon before the shooting between 3:40 p.m. and 3:55 p.m. The defendant allegedly asked Brown whether she had seen White. Patricia Laster also averred she saw the defendant in his auto between 3:00 p.m. and 4:00 p.m. on November 4, 1988. Both women testified they had observed defendant strike White on previous occasions.

State v. White, No. 1991 WL 8581 at *1-*3 (Ohio Ct. App., Jan. 31, 1991), *aff'd*, 647 N.E.2d 787 (Ohio 1995).

On May 12, 1989, a jury found White guilty of one count of aggravated murder with a firearm specification and two counts of felonious assault with firearm specifications. On May 15, 1989, the trial court sentenced him to 20 years to life for aggravated murder, three years for the firearms specification, and 8-to-15 years on each count of felonious assault, all to be served consecutively. On January 31, 1991, the Ohio Court of Appeals overruled the petitioner's assignments of error, but *sua sponte* ordered the trial court to vacate one of his convictions for felonious assault under the allied offenses doctrine. The court of appeals's decision was journalized on February 11, 1991.

Although the petitioner obtained representation from the Office of the Ohio Public Defender in 1991, the attorney assigned to White's case did not file an application for reopening alleging that his appellate counsel had rendered ineffective assistance in failing to raise four assignments of error until three years later, on February 16, 1994. The court

of appeals denied White's application for reopening, finding it to be untimely based on Ohio App. R. 26(B), which provides:

> A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the application shows good cause for filing at a later time.

The petitioner attached to his application for reopening an affidavit from his attorney stating that he had been assigned White's case in 1991 but had been unable to review the merits of the case until late 1993, as a result of his office's "overwhelming caseload" and his own "personal heavy caseload." White's counsel argued that his heavy caseload served as "good cause," as that phrase is used in Rule 26(B), to excuse his tardiness. The Ohio Court of Appeals rejected that argument, stating that "an applicant's ignorance of App. R. 26(B) or its procedural requirements will not establish good cause for the untimely filing of an application for reopening," and that "an 'office's overwhelming caseload and my personal heavy caseload' does not establish good cause for the untimely filing of an application for reopening as brought pursuant to App. R. 26(B)." The Ohio Supreme Court affirmed that decision, *see State v. White*, 647 N.E.2d 787 (Ohio 1995), and the United States Supreme Court denied certiorari. *See White v. Ohio*, 516 U.S. 892 (1995).

White then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Ohio, raising the following claims:

> (1) violation of petitioner's rights to due process and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution on the grounds of prosecutorial misconduct; (2) petitioner's Fifth and Fourteenth Amendment rights against self-incrimination, to due process and a fair trial were denied when the trial court repeatedly allowed introduction of other acts evidence and extrinsic evidence of petitioner's character to be presented to the jury; (3) petitioner's Sixth and Fourteenth Amendment rights to confrontation and cross-examination were denied when the prosecution was permitted to introduce hearsay evidence in the form of prior statements made by the decedent; and (4) petitioner's Sixth and Fourteenth amendment rights to effective assistance of appellate counsel were denied when: [a] appellate counsel failed to raise an issue on appeal that but for counsel's failure there is a reasonable probability that the result of the appeal would have been different and, [b] Ohio provides no remedy for vindication of a denial of the defendant's right to the effective assistance of counsel.

The case was referred to a magistrate judge, who issued a report and recommended that the petition be dismissed because the claims were procedurally defaulted under Ohio App. Rule 26(B) and because the petitioner was unable to show cause and prejudice for the default. Over the petitioner's objections, the district court adopted the magistrate judge's report and recommendation and dismissed

the petition based on procedural default. This appeal followed.

ANALYSIS

White appeals the district court's dismissal of his habeas corpus petition on the basis of procedural default. In considering a district court's disposition of a habeas petition, we review the district court's legal conclusion *de novo*, and its factual findings for clear error. *See Carpenter v. Mohr*, 163 F.3d 938, 942-43 (6th Cir. 1998), *cert. granted*, 120 S.Ct. 444 (1999).

Under *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir.1986), this circuit utilizes the following four-part analysis when the state argues that a federal habeas claim has been procedurally defaulted in state court: (1) whether there is a procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to follow this rule; (2) whether the state courts actually enforced the state procedural rule; (3) whether the state procedural rule is an adequate and independent state ground to foreclose federal relief; and if so (4) whether the petitioner has established cause for his failure to follow the rule and prejudice by the alleged constitutional error.

The petitioner contends that none of the first three factors of the *Maupin* test have been met. He also argues, in the alternative, that even if those three factors have been satisfied, he is able to show cause and prejudice for his default under the fourth factor, thereby entitling him to federal court review of the merits of his habeas corpus claims. He also argues that the court may excuse his procedural default because failure to address the merits of his constitutional claims will result in a fundamental miscarriage

of justice. We consider each of the four *Maupin* factors in turn, addressing petitioner's arguments in the process.

The first *Maupin* factor requires us to consider whether there is a procedural rule that is applicable to the petitioner's claim and whether he failed to follow that rule. The petitioner argues that there was no procedural rule applicable to his claim because Ohio's App. R. 26(B) was not in effect at the time his direct appeal was decided on January 31, 1991, and he filed an application to reopen his appeal as soon as the claim of appellate ineffectiveness was discovered. We find this argument unmeritorious. Although White is correct that prior to July 1, 1993, Rule 26 did not contain a distinct provision for ineffective assistance of counsel claims, it did set forth a ten-day time limit for the "application for reconsideration of any cause or motion submitted on appeal." Following the Ohio Supreme Court's recommendation that the legislature adopt an amendment to better serve defendants who allege ineffective assistance of appellate counsel, *see State v. Murnahan*, 584 N.E.2d 1204 (Ohio 1992), Rule 26(B) was enacted to provide a 90-day limit for ineffective assistance of appellate counsel claims.

Rule 26(B) is clearly applicable to the petitioner's claim and would have required White to file his motion to reopen within 90 days of its effective date, July 1, 1993. However, as the Ohio Court of Appeals noted in denying White's motion to reopen, "[t]he application for reopening ... was not filed ... until February 16, 1994, more than three years after journalization of the appellate judgment, one year and eleven months after the announcement of *State v. Murnahan* (1992), 63 Ohio St. 3d 60, and more than seven months after the effective date of App. R. 26(B). On its face, the application for reopening is untimely." *State of Ohio v. Frederick White*, No. 57944 slip op. at 1-2 (Ohio Ct. App.,

Oct. 19, 1994). We thus conclude that there was an applicable rule in place and that White failed to follow it.

Turning to the second *Maupin* factor, we must consider whether the state courts actually enforced the state procedural rule. The Ohio Court of Appeals held that it was compelled to deny the petitioner's application for reopening because it was untimely under Rule 26(B) and no good cause existed to excuse that untimeliness. The court also said:

> Notwithstanding the fact that the application for reopening is untimely, a substantive review of the applicant's supporting memorandum clearly demonstrates that *res judicata* prevents the reopening of the appellate judgment that was rendered in *State v. White* (Jan. 31, 1991), Cuyahoga App. No. 57944, unreported. The doctrine of *res judicata* prohibits a defendant from relitigating any defense or claim of error that has been previously raised on direct appeal. *State v. Perry*, 10 Ohio St. 2d 175 (Ohio 1967). . . . In an attempt to reopen the appellate judgment that was rendered by this Court, the applicant raises four proposed assignments of error which appellate counsel allegedly failed to argue upon appeal. These four proposed assignments of error address the following issues: (1) other acts testimony (Evid. R. 404); (2) hearsay evidence (Evid. R. 801); (3) extensive evidence to impeach defendant's character (Evid. R. 608); and (4) prosecutorial misconduct. This court, however, has previously examined upon direct appeal each of the applicant's four proposed assignments of error. Through the fourth, fifth, and sixth assignments of error as raised on direct appeal, this Court reviewed the issues of other acts testimony, hearsay evidence, and extrinsic evidence to impeach

> defendant's character. In addition, this court addressed the issue of prosecutorial misconduct in light of the harmless error rule (Crim. R. 52(A)) and held that: "Although the prosecutor repeatedly violated the rules of evidence in this case, we are compelled to find these errors harmless in light of the overwhelming evidence of the defendant's guilt. *State v. Abrams* (1974), 39 Ohio St.2d 53; *Chapman v. California* (1967), 386 U.S. 18. . . ."

Id. at 4-5.

White argues that the appeals court's alternative holding – that his claims would be barred by *res judicata* even if they were not procedurally barred – constitutes a decision on the merits and that his claims, therefore, are not procedurally barred.[1] We cannot agree. As the Supreme Court has explained, "a state court need not fear reaching the

---

[1] He argues further that his application for reopening was a nullity because the court held that it had already decided his claims on direct appeal. A review of petitioner's direct appeal brief and the appeals court's resolution reveals that the court had indeed decided the merits of petitioner's claims regarding the admission of other acts testimony, hearsay evidence, and extensive evidence to impeach his credibility, but those claims had only been framed and ruled upon as violations of state law. The import of the claim raised in the application for reopening was that White's appellate counsel rendered ineffective assistance in failing to raise those claims as violations of federal law. Indeed, the petitioner does not contend that he raised those claims as violations of federal law in his direct appeal, but instead that this court should deem it so based on the court of appeals's language in denying the application for reopening.

merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) (emphasis in original); *accord Sochor v. Florida*, 504 U.S. 527, 533 (1992). As we concluded in *Coe v. Bell*, 161 F.3d 320, 330 (6th Cir. 1998), *cert. denied*, 120 S.Ct. 110 (1999), "[t]he alternative holding thus does not require us to disregard the state court's finding of procedural bar."

We turn next to the third *Maupin* factor, which requires us to consider whether the state procedural rule is an adequate and independent state ground to foreclose federal relief. Such a rule is adequate if it is regularly or consistently applied by the state court, *see Johnson v. Mississippi*, 486 U.S. 578, 587 (1988), and is independent if it does not "depend[ ] on a federal constitutional ruling." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985); *see also Mapes v. Coyle*, 171 F.3d 408, 421 (6th Cir. 1999), *petition for cert. filed*, 68 USLW 3116 (July 29, 1999) No. 99-203) ("[T]he fact that a petitioner has not complied with a state procedural rule cannot bar federal review of constitutional claims if the state rule is not 'firmly established and regularly followed.'") (internal quotation marks and citation omitted)).

White argues that the "good cause" requirement of Ohio's App. R. 26(B) does not constitute an adequate and independent state ground because it is neither firmly established nor uniformly applied by the Ohio courts. In support of his argument, White cites to instances in which courts have allowed delays well after the 90-day deadline and also argues that Rule 26(B) does not provide any clear

guidelines for determining when a petitioner can file his petition beyond the 90-day filing period.

A review of the Ohio court of appeals cases attached to Petitioner's brief reveals that the state courts have not achieved consensus on what constitutes "good cause" to excuse non-compliance with Rule 26(B). *See, e.g., State v. McCarter*, No. 62346 (Ohio App. 8 Dist., Aug. 12, 1994) (holding pro se status and ignorance of the law did not constitute "good cause" to excuse filing of application for reopening almost three years after journalization and seven months after effective date of new Rule 26(B)); *State v. Nitenson*, No. 91 CA 796, 1994 WL 69894 (Ohio App. 4 Dist., Feb. 24, 1994) (holding *pro se* status constitutes good cause to excuse filing of an application for reopening over one year after journalization of appellate judgment); *State v. Klein*, No. 49260 (Ohio App. 8 Dist., March 15, 1994) (holding *pro se* status and ignorance of law did not constitute "good cause" to excuse filing of application for reopening five months after journalization and two months after effective date of new Rule 26(B)); *State v. Wright*, No. 93 CA 2110, 1994 WL 398805 (Ohio App. 4 Dist., July 29, 1994) (holding state's failure to respond to an application for reopening constitutes "good cause"); *State v. Fields*, No. 95 CA-08-048 (Ohio App. 5 Dist., April 21, 1994) (same); *State v. Wright*, No. 93 CA 2110, 1994 WL 398805 (Ohio App. 4 Dist., July 29, 1994) (same). Nonetheless, we recognize that the rule is relatively new and acknowledge that it may take some time for the Ohio courts to achieve consensus.

In any event, we need not focus on whether the good cause exception to Rule 26(B) constitutes an independent and adequate state ground, because we conclude, upon consideration of the fourth *Maupin* factor, that the petitioner has established cause for his failure to follow the state

procedural rule. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.") The district court, through the adoption of the magistrate judge's report and recommendation, held that ineffective assistance of appellate counsel did not serve as cause because "[c]ounsel's failure to file a timely application for reopening because he had a heavy case load does not constitute an objective factor external to the defense." We disagree. The external cause for the petitioner's non-compliance with Rule 26(B) is provided by the continued deficiencies in the office of the Ohio Public Defender. Although the petitioner states in his appellate brief that the cause for his procedural default was ineffective assistance of appellate counsel in his direct appeal, it is clear from other portions of his brief, the affidavit from his counsel at the Ohio Public Defender's Office, his arguments before the state courts, and simple logic that the reason the application for reopening was filed three years late was the failure of his attorney to file that pleading in compliance with the rule. As evidenced in the present case and as noted in *Paris v. Turner*, No. 97-4129, 1999 WL 357815 (6th Cir. (Ohio) May 26, 1999), the public defender's office has repeatedly failed to preserve the right of criminal defendants to challenge the constitutionality of their convictions due to its disregard, whether intentional or because of inadequate funding and staffing, of filing deadlines and procedural barriers.

Without question, an attorney's failure or refusal to abide by established time deadlines in handling a client's appeal is conduct falling below the minimal standards of competency that federal case law has imposed upon counsel to satisfy constitutional safeguards. *See Strickland v. Washington*, 466 U.S. 668, 698 (1984) (a finding of ineffective assistance of counsel requires first that an attorney's representation fall below an objective standard of reasonableness). *See also Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998) (failure to perfect a direct appeal in derogation of a request to do so is a *per se* violation of the Sixth Amendment, regardless of whether the appeal would have been successful). In fact, such deficiencies have been held to constitute ineffective assistance of counsel per se. *See Rodriguez v. United States*, 395 U.S. 327, 330 (1969) ("Those whose right to appeal has been frustrated should be treated exactly like any other appellant; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage of the proceedings.").

The State of Ohio argues, nevertheless, that a petitioner such as White has no constitutional right to counsel at any stage of criminal proceedings beyond a direct appeal as of right. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Without a right to counsel, the petitioner also has no commensurate right to effective assistance from that counsel. However, as this court's decision in *Manning v. Alexander*, 912 F.2d 878, 882 (6th Cir. 1990), made clear, Ohio law does not consider an attack on the adequacy of appellate counsel to be proper in a state habeas proceeding. *See Manning*, 912 F.2d at 882 (citing *Manning v. Alexander*, 553 N.E.2d 264 (Ohio 1990); *In re: Petition of Brown*, 551 N.E.2d 954 (1990)). Furthermore, *Murnahan* emphatically holds that any such attack cannot be considered part of an Ohio post-conviction matter.

If the application for delayed reconsideration is neither part of a state habeas nor state post-conviction proceeding, it must be a continuation of activities related to the direct appeal itself. Because a defendant is entitled to effective assistance of counsel on direct appeal, *see Evitts v. Lucey*, 469 U.S. 387, 396 (1985), such an individual must be accorded effective assistance of counsel throughout *all* phases of that stage of the criminal proceedings. The failure of the Ohio Public Defender to offer such constitutionally-mandated counsel excuses the failure of the petitioner to abide by the timing requirements of applicable procedural rules.

Therefore, upon establishing that he was actually prejudiced by any ineffective representation, the petitioner is entitled to present to a federal court for merit review those claims that should have been brought to the attention of the Ohio state courts throughout the course of the petitioner's legal battles. *See Coleman*, 501 U.S. at 750. Having found no cause for White's default, neither the magistrate judge nor the district judge addressed the prejudice prong. Accordingly, unless there is another basis upon which to excuse the petitioner's procedural default, we must remand to the district court to decide whether the petitioner can establish prejudice.

White claims that there is such an alternative basis to excuse his procedural default, arguing that even if this court finds that he has not shown cause and prejudice, the procedural default should nonetheless be excused because a fundamental miscarriage of justice would result from a failure to entertain the claim. *See id.* In analyzing such a claim, the inquiry is a narrow one, where the petitioner must "point to a constitutional violation that probably resulted in the conviction of one who was actually innocent." *Ritchie v.*

Eberhart, 11 F.3d. 587, 593 (6th Cir.1993); *accord Schlup v. Delo*, 513 U.S. 298, 321 (1997); *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The petitioner argues that the following evidence shows that he is actually innocent:

> There were two eyewitnesses to the crime. Richard Gibson testified he could not identify the perpetrator. Jackie Glenn identified Mr. White but admitted she told the police after the incident that she did not see the assailant because she was pushed aside, out of the way, and had her head down. The State's evidence is contradicted by the evidence presented by White. Mr. White produced credible evidence at his trial that he was in Columbus, Ohio at the time of his ex-wife's murder. In addition to the alibi testimony from his wife, Mr. White introduced testimony from two disinterested witnesses who testified to seeing Mr. White the night before and the morning of the murder in Columbus, Ohio. . . . The State of Ohio convicted Mr. White based upon his past conduct, bad character, hearsay and prosecutorial misconduct.

We conclude that the petitioner has not made a colorable showing of actual innocence under the *Carrier/Schlup* standard. As the petitioner acknowledges, this evidence was presented to the jury, which chose to credit the state's evidence over that offered by the petitioner. Although we might agree with the Ohio Court of Appeals's assessment that the prosecutor violated the rules of evidence in this case, there is no basis for us to second-guess the jury's credibility determination and its resulting verdict. Accordingly, because a miscarriage of justice will not result from the court's failure to review this claim, it does not excuse the petitioner's failure to comply with state procedural rules. *See Ritchie*, 11 F.3d at 593.

However, as previously stated, we conclude that the petitioner has shown cause for his default, and if he is able to demonstrate that he was actually prejudiced by the alleged constitutional error, he is entitled to federal review of the merits of his constitutional claims. Because the issue of prejudice is not adequately briefed, we remand for the district court to consider the issue, keeping in mind the following guidelines for such analysis articulated in *Maupin*, which the court gleaned from various Supreme Court cases: (1) "the prejudice that must be shown must be a result of the alleged constitutional violation and not a result of the trial counsel's failure to meet state procedural guidelines;" (2) "the burden is on the petitioner to show that he was [actually] prejudiced by the alleged constitutional error..., not merely a possibility of prejudice;" and (3) "in analyzing a petitioner's contention of prejudice, the court should assume that the petitioner has stated a meritorious constitutional claim." 785 F.2d at 139 (citations omitted). Of course, if the district court finds that the petitioner has established prejudice, it should proceed to decide the merits of his constitutional claims.

Finally, we note the petitioner's argument that Rule 26(B) is unconstitutional as applied in Ohio because it deprives indigent, incarcerated, uncounseled inmates due process and equal protection of the laws. These claims were not raised in the district court, however. "When a party fails to present an argument to the district court, we have discretion to resolve the issue only where the proper resolution is beyond any doubt, or where injustice might otherwise result." *See Enertech Elec., Inc. v. Mahoning County Comm'r*, 85 F.3d 257, 261 (6th Cir. 1996). We decline, in this instance, to treat these issues as a matter of initial review.

CONCLUSION

We conclude that Ohio criminal defendants have a federal constitutional right to effective assistance of counsel during an application for reopening and that the petitioner's counsel in this case was constitutionally ineffective in failing to file such an application in a timely fashion, thus constituting cause to excuse any failure to comply with the procedural requirements contained in Ohio Rule of Appellate Procedure 26(B). Accordingly, we remand to the district court to consider whether the petitioner has established that he was actually prejudiced by the alleged constitutional error and, if so, to review his constitutional claims on their merits.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-4066

FREDERICK WHITE,
Petitioner-Appellant,

v.

JAMES SCHOTTEN, WARDEN
Respondent-Appellee.

Filed: May 10, 2000

Before: KEITH, DAUGHTREY, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

s/ Leonard Green
LEONARD GREEN, CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 1:95-CV-2801

FREDERICK WHITE,
Petitioner

v.

JIM SCHOTTEN, WARDEN,
Respondent.

Filed: August 14, 1997

MEMORANDUM OF OPINION AND ORDER

This matter comes before the Court upon the Report and Recommendation of Magistrate Judge Patricia A. Hemann on July 23, 1996 (Doc. 13). The named Report is hereby ACCEPTED by this Court, along with the findings of fact and conclusions of law therein.

Standard of Review

The applicable standard of review for a magistrate judge's report and recommendation depends upon whether objections were made to that report. When objections are made to a report and recommendation of a magistrate judge,

the district court reviews the case *de novo*. Fed. R. Civ. P. 72(b) provides this standard of review.

> The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence or recommit the matter to the magistrate judge with the instructions.

Accordingly, this Court will review *de novo* any portion of a magistrate judge's report and recommendation to which timely objections have been filed. *See Massey v. City of Ferndale*, 7 F.3d 506 (6th Cir. 1993).

Conclusion

This Court has reviewed *de novo* the Report and Recommendation of the instant case to which timely objections were filed. This Court has considered all of the filings, motions and evidence submitted by the parties, and adopts in their entirety the findings of fact and conclusions of law of Magistrate Judge Hemann as its own. The Court agrees with the conclusion that petitioner procedurally defaulted in state court and has failed to show good cause for that default. Petitioner's objections to the report are unsubstantiated by applicable law.

For the foregoing reasons, the Report and Recommendation of Magistrate Judge Hemann is hereby ACCEPTED. Consistent with the ruling, Frederick White's

petition for a writ of habeas corpus is denied. Pursuant to 28 U.S.C. §1915(a), this Court certifies that an appeal could not be taken in good faith. This Court declines to issue a certificate of appealability as to any issue raised by petitioner. 28 U.S.C. §2253(c). FRAP 22(b).

IT IS SO ORDERED.

s/Patricia A. Gaughan
PATRICIA A. GAUGHAN,
United States District Judge

JUDGMENT ENTRY

This Court, having filed its Memorandum of Opinion and Order denying Frederick White's petition for a writ of habeas corpus, hereby enters judgment in favor of respondent and against petitioner. Pursuant to 28 U.S.C. §1915(a), this Court certifies that an appeal could not be taken in good faith. This Court declines to issue a certificate of appealability as to any issue raised by petitioner. 28 U.S.C. §2253(c). FRAP 22(b).

IT IS SO ORDERED.

s/Patricia A. Gaughan
PATRICIA A. GAUGHAN,
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 1:95-CV-2801

FREDERICK WHITE,
Petitioner

v.

JIM SCHOTTEN, WARDEN,
Respondent.

Filed: July 23, 1996

MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

This matter is before the magistrate judge pursuant to Local Rule 5:1.2(d). Before the court is Frederick White's ("White") petition for a writ of habeas corpus filed pursuant to Title 28, United States Code section 2254 on December 27, 1995, Williams is in the custody of the Ohio Department of Rehabilitation and Correction pursuant to a journal entry of sentence in the case of *State of Ohio v. Frederick White*, Case No. CR-236521 (Cuyahoga Cty. 1989). For the reasons set forth below, the magistrate judge recommends that the petition be denied.

In January 1989 the Cuyahoga County Grand Jury returned a four count indictment against White for Aggravated Murder with a gun specification; two counts of Felonious Assault with a gun specification; and Having a Weapon while under Disability with a gun specification. Prior to trial, the court severed the count of having a weapon under a disability. On May 12, 1989 a jury found White guilty of the three remaining courts in the indictment. He was sentenced to a term of twenty years to life for aggravated murder and two terms of eight to fifteen years for each of the felonious assault convictions. The court ordered the sentences to be served consecutively.

The convictions arose out of the fatal shooting of White's former wife, Kimberly Hawkins White, outside the nursing home at which she was employed. At the end of her shift, Ms. White asked one of her coworkers, Jacqueline Glenn, for a ride home. Ms. Glenn replied that she was being picked up by a friend, Richard Gibson. The two women walked to Mr. Gibson's van and he agreed to drive Ms. White home. As the women were entering the van, a man ran from behind a nearby tree and fired a shotgun at Ms. White. Three or four shots were fired, one shot hit Ms. White's foot and a second shot hit her abdomen, perforating her aorta. Ms. Glenn heard Ms. White shout, "Wait, Rick, wait." Mr. Gibson heard the decedent state that her husband shot her.

During the police investigation, Ms. Glenn identified White's picture as the assailant from an array of five photographs. Mr. Gibson was unable to make an identification. A police officer who responded to the scene and a nun who worked at the nursing home testified during White's trial that they heard the wounded Ms. White identify her husband as the assailant. There also was testimony that White had a history of physically abusing Ms. White. White

denied killing his former wife and testified that he was in Columbus, Ohio at the time of the shooting. White's wife at the time of incident corroborated his testimony, stating that White was with her during the morning of the shooting.

Following his conviction, White filed a direct appeal with the Eighth District Court of Appeals raising the following assignments of error.

I. The evidence is insufficient to sustain the conviction of felonious assault relating to Richard Gibson.

II. The trial court erred in failing to suppress identification testimony arising from an unduly suggestive photographic array.

III. The trial court erred and denied appellant a fair trial by limiting appellant's scope of cross-examination of the state's witness in violation of Ohio Rules of Criminal Procedure 16(B)(1)(g).

IV. The trial court erred by allowing prejudicial other acts evidence into evidence.

V. The trial court erred by allowing a prejudicial hearsay statement of the deceased into evidence.

VI. The trial court erred by allowing extrinsic evidence of bad conduct of the appellant to be received by the jury in contravention of Ohio Rule of Evidence 608(b).

VII. The trial court erred by prohibiting the testimony of a psychologist regarding eyewitness testimony and the human memory.

On January 31, 1991 the court of appeals vacated one of the felonious assault convictions, finding that the two felonious assault convictions were allied offenses of similar import and the record failed to show the defendant acted with the distinct animus necessary to support two separate convictions. The murder conviction and the second felonious assault conviction were upheld. White did not appeal the decision of the Eighth District Court of Appeals to the Ohio Supreme Court.

Three years later, in February 1994, White filed an application to reopen his direct appeal in the Eighth District Court of Appeals. White argued that his appellate counsel was ineffective because counsel failed to raise the following four assignments of error in the direct appeal:

I. The appellant was denied the right to due process and a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, sections 10 and 16 of the Ohio Constitution, on the grounds of prosecutorial misconduct.

II. Appellant's Fifth and Fourteenth Amendment rights against self-incrimination and to due process of law are denied when a trial court repeatedly allows introduction of other acts evidence at trial.

III. Appellant's Sixth and Fourteenth Amendment rights to confrontation and cross-examination

are denied when the state is permitted to introduce hearsay evidence in the form of prior statements of the deceased.

IV. Appellant's Fifth and Fourteenth Amendment rights to due process and a fair trial are violated when the state is permitted to introduce extrinsic evidence to impeach appellant's character.

On October 19, 1994 the Eighth District Court of Appeals denied the application for reopening, finding that White did not assert good cause for failing to file his application within 90 days after journalization of the appellate judgment as required by statue. The court of appeals also reviewed White's supporting memorandum and concluded that his claims were barred by *res judicata* because they had previously been raised on direct appeal.

White appealed the Eighth District Court of Appeals decision to the Ohio Supreme Court raising three propositions of law:

I. A criminal defendant is denied his state and federal constitutional rights to the effective assistance of appellate counsel when the court of appeals ignores all meritorious ineffective assistance of appellate counsel claims filed later than ninety days from the court of appeals' decision on direct appeal.

II. The misapplication of the doctrine of res judicata to claims of ineffective assistance of appellate counsel denies an appellant due process and denies him a remedy to address

such claims, in violation of the due process clauses of the Ohio and United States Constitutions and in violation of Article I, section 16, of the Ohio Constitution.

III. A defendant's federal constitutional right to the effective assistance of appellate counsel is denied when counsel fails to raise an issue on appeal that, if raised, there was a reasonable probability the result of the appeal would have been different.

On April 26, 1995 the Ohio Supreme Court affirmed the judgment of the court of appeals consistent with the opinion of that court.

White is now before this court seeking a writ of habeas corpus pursuant to 28 U.S.C. §2254. He states four claims for relief as follows:

I. Violation of petitioner's rights due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution on the grounds of prosecutorial misconduct.

II. Petitioner's Fifth and Fourteenth Amendment rights against self incrimination, to due process and a fair trial were denied when the trial court repeatedly allowed introduction of other acts evidence and extrinsic evidence of petitioner's character to be presented to the jury.

III. Petitioner's Sixth and Fourteenth Amendment rights to confrontation and cross-examination

were denied when the prosecution was permitted to introduce hearsay evidence in the form of prior statements made by the decedent.

IV. Petitioner's Sixth and Fourteenth Amendment rights to effective assistance of appellate counsel were denied when: (1) appellate counsel failed to raise an issue on appeal that but for counsel's failure there is a reasonable probability that the result of the appeal would have been different and, (2) Ohio provides no remedy for vindication of a denial of the defendant's right to the effective assistance of appellate counsel.

Respondent filed a Return of Writ on February 26, 1996. Petitioner filed a reply on April 5, 1996. Thus the petition is ready for decision.

II

1. Jurisdiction

Petitioner is in the custody of the State of Ohio at the Trumbell Correctional Institution in Trumbell County, Ohio. Petitioner filed his writ of habeas corpus in the Northern District of Ohio and raises claims regarding the constitutionality of his incarceration under 28 U.S.C. §2254.

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in

> custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. §2254(a). This court has jurisdiction over petitioner's claims.

2. Evidentiary Hearing

The habeas corpus statute authorizes an evidentiary hearing when the factual findings of the court were inadequately developed, their reliability has been questioned, or relevant facts are in dispute. 28 U.S.C. §2254(d). There is no need for an evidentiary hearing in the instant case. All of petitioner's claims involve legal issues which can be independently resolved without additional factual inquiry.

3. Exhaustion of State Remedies

Prior to seeking review of conviction by federal habeas corpus, a state prisoner must exhaust all remedies available in state court. 28 U.S.C. §2254(b) and (c); *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Riggins v. McMackin*, 935 F.2d 790, 793 (6th Cir. 1991). The prisoner must fairly present any claims to the state in a constitutional context. *Anderson v. Harless*, 459 U.S. 4 (1982); *Picard v. Connor*, 404 U.S. 270 (1971); *Shoultes v. Laidaw*, 886 F.2d 114, 117 (6th Cir. 1989). The exhaustion requirement is satisfied when the highest court in the state where petitioner was convicted has been given a full and fair opportunity to rule on all of the petitioner's claims. *Manning v. Alexander*, 912 F.2d 878, 881-83 (6th Cir. 1990).

White filed a direct appeal of his conviction in the Eighth District Court of Appeals and thereafter filed an application to reopen that decision which he appealed to the Ohio Supreme Court. The State acknowledges that White

does not have a remaining state court remedy available to him and concludes that White has met his exhaustion requirement. Petitioner does not identify any remaining remedy in the state courts. Therefore, this court will consider White's habeas claims exhausted.[1]

III

Respondent argues that White's four habeas claims are procedurally defaulted because the state appellate and supreme courts did not reach the merits of his claims in his application for reopening. The Eighth District Court of Appeals held that White did not comply with the requirement of Ohio App. R. 26(B) that good cause be shown for filing an application for reopening more than 90 days after journalization of the appellate judgment. The Ohio Supreme Court affirmed consistent with the opinion of the court of appeals. The State argues that because the Ohio state courts relied on this procedural bar in denying review of the merits of the claims raised in the application for reopening, federal habeas review is precluded. White responds that his habeas claims have not been procedurally defaulted because App. R. 26(B) did not exist at the time of his direct appeal in 1991, and therefore he could not comply with the 90 day rule.

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[1] White did not file a direct appeal in the Ohio Supreme Court. Where an appellant has not filed a direct appeal, he may file a delayed appeal under S. Ct. Prac. R. II section 2(A)(4). It is unlikely, however, that the Ohio Supreme Court would allow White's delayed appeal where it is filed five years after the court of appeals entered its judgment, White has not asserted cause for his failure to timely file a direct appeal, and he did appeal his application for reopening his direct appeal to the Ohio Supreme Court.

If a prisoner fails to follow a state court procedural rule, and this procedure default, distinct from federal constitutional grounds, is an adequate and independent state ground for the court's decision, the prisoner is barred from subsequent federal habeas corpus review of his claims. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). An exception is made, however, where the prisoner can show cause for the default and actual prejudice as a result of the alleged violation of federal law or can demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Id.* A habeas petitioner who fails to comply with a state's procedural rule deprives the state courts of an opportunity to reach the merits of the federal claims. *Id.* at 731.

A federal habeas petitioner's procedural default precludes review "only if the last state court rendering a judgment in the case rests its judgment on the procedural default." *Harris v. Reed*, 489 U.S. 255, 262 (1989). In White's case, the last state court to render judgment was the Ohio Supreme Court, which review White's application for reopening an issue a one page order affirming the judgment of the court of appeals consistent with that court's opinion. (State's exh. L.) Because the Ohio Supreme Court adopted the opinion of the court of appeals, this court will look to the court of appeals decision to determine whether it relied upon an independent and adequate state ground. *See Yist v. Nunnemaker*, 501 U.S. 797, 803 (1991) (holding that where there has been one reasoned state court judgment, a federal habeas court should consider later unexplained orders upholding that judgment as resting upon the same ground).

The court of appeals denied White's application for reopening because the court found that he did not show good cause for filing his application for reopening more than 90

days after entry of the original appellate judgment. (State's exh. H.) Under Ohio law an application for reopening must be filed in the court of appeals within 90 days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time. Ohio App. R. 26(B)(1). The court of appeals clearly and expressly stated that its judgment rested on a procedural bar and did not reach the merits of White's claims. Because the last state court rendering a judgment in White's case rested its judgment on a procedural bar, this court is precluded from reviewing his habeas claims.[2]

In his Return of Writ, petitioner argues that he did not procedurally default his claims because he could not have complied with the 90 day rule of Ohio app. R. 26(B)(1) since the rule did not exist at the time that his direct appeal was decided. The judgment in White's direct appeal was journalized on February 11, 1991. App. R. 26(B)(1), which amended original App. R. 26 to provide for an application for

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[2] White's first three claims in his habeas petition assert due process violations, arguing that the prosecution engaged in misconduct by introducing evidence of prior bad acts, prejudicial hearsay evidence, vouching for the credibility of witnesses, and making improper closing arguments; and, additionally, that the trial court admitted other acts evidence, extrinsic character evidence and hearsay evidence in the form of prior statements made by the decedent. White's fourth claim asserts ineffective assistance of appellate counsel and failure of the Ohio Courts to provide a remedy. The gist of the due process claims was raised in White's application for reopening. He also asserted ineffective assistance of appellate counsel. The second part of his appellate counsel claim was not raised in the state courts; it asserts that Ohio App. R. 26(B) is unconstitutional.

reopening within 90 days of the journalization of the appellate judgment, was enacted on July 1, 1993. White filed his application for reopening on February 16, 1994. At the time that he filed his application for reopening, White knew that he had not complied with the 90 day requirement. App. R. 26(B)(1), however, provides that a petitioner may file outside the 90 day period if he shows good cause for filing at a later time. When he filed his application for reopening, White attempted to establish good cause for the untimely filing by submitting an affidavit in which his counsel stated that his application was not timely filed due to counsel's heavy caseload. (State's exh. H, p. 2.) The court of appeals found that White did not establish good cause because lack of counsel to prosecute an application for reopening does not excuse an applicant's late filing. Therefore, White's attempt to use the new rule failed.[3]

White's argument that the good cause requirement should not be applied to him because App. R. 26(B)(1) did not exist within 90 days of the journalization of the appellate judgment in his direct appeal was found invalid in a similar case by the Ohio Supreme Court. In *State v. Reddick*, 72 Ohio St. 3d 88, 647 N.E.2d 784 (1995), the court considered an application for reopening filed in 1993 that sought to reopen a judgment entered in 1987. The court noted that prior to enactment of App. R. 26(B), a defendant seeking to claim ineffective assistance of appellate counsel could file his claim under App. R. 26 and App. R. 14(B), which allowed

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[3] White's counsel explains that he attempted to use the new rule in order to separately assert the prosecutorial misconduct claim and to raise the due process claims in the state court as federal constitutional issues because White's original appellate counsel failed to do so. (Reply to Return of Writ, pgs. 4-5.)

for enlargement of the ten day time period in Rule 26 for "good cause shown." 72 Ohio St. 3d at 90. The court held that "an applicant who seeks to reopen an appellate judgment journalized before July 1, 1993 may not simply rely on the fact that App. R. 26(B) did not exist within the ninety days following journalization of the appellate judgment, but must show good cause why he or she did not attempt to invoke the procedures available under former App. R. 26 and 14(B)." *Id.* White has not shown good cause for his failure to make the appropriate motion prior to 1993; therefore he has procedurally defaulted his claims under both App. R. 26(B) and the previously available remedy.

White alternatively argues that he did not procedurally default because his habeas claims I, II and III were raised in his direct appeal to the Eighth District Court of Appeals, which addressed the merits of the claims. White, however, did not appeal the court of appeals decision to the state supreme court. The only appeal that White made to the Ohio Supreme Court was the appeal of the court of appeals' denial of his application for reopening, which the Ohio Supreme Court affirmed on procedural grounds. Further, as White acknowledges, the claims in his direct appeal were made on state procedural grounds and not in a federal constitutional context.[4]

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[4] White argues that the Eighth District Court of Appeals ruled that it had considered the evidentiary issues in a federal constitutional context when the court held that White's federal claims raised in the application for reopening were barred by the doctrine of *res judicata* because they had been considered in the direct appeal. The court of appeals, however, both in the direct appeal and in the application for reopening, addressed the claims in a state evidentiary context. Errors in the application of state law, especially rulings

Having determined that White procedurally defaulted on his claims, the court will consider whether he has established cause and prejudice or a fundamental miscarriage of justice. "To establish cause a petitioner must present a substantial reason to excuse his procedural default." *Rust v. Zent*, 17 F.3d 155 (6th Cir. 1994). White asserts ineffective assistance of appellate counsel as cause for his failure to timely file his application for reopening. Although attorney error can constitute cause for a procedural default, the existence of cause turns on "whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 447 U.S. 478, 488 (1986). Examples of external impediments are situations where the factual or legal basis for a claim is not available to counsel or interference by state officials prevents attorney compliance with a rule. *Id.* "Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" *Coleman*, 501 U.S. at 752. Counsel's failure to file a timely application for reopening because he had a heavy case load does not constitute an objective factor external to the defense. To accept the explanation of a large work load as cause to excuse the timely filing of motions would vitiate the requirement of timely filings altogether. Therefore, White has not shown cause for his procedural default. Because White has not established cause, the court will not consider prejudice.

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regarding the admission or exclusion of evidence, are not cognizable in federal habeas corpus unless there is a denial of fundamental fairness. *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988).

Finally, this is not a cause where a procedural default should be excused in order to prevent a fundamental miscarriage of justice. White has not produced evidence that he is actually innocent of the murder of his ex-wife. An eyewitness identified White as the man who shot his wife. An employee identified White as the man she noticed standing outside the nursing home on the morning of the murder. The decedent's daughter testified that White had threatened her mother on the night preceding the murder. White had a history of physically abusing his wife. A reasonable juror could have convicted White of the murder of his wife. Because there is no showing of actual innocence, White is not entitled to an exception to the cause and prejudice rule. White has failed to demonstrate either cause and prejudice or actual innocence to excuse his procedural default.

IV

For all of the above reasons, the magistrate judge recommends that White's petition for a writ of habeas corpus be denied.

Date: 7/19/96

s/Patricia A. Hemann
Patricia A. Hemann
United States Magistrate Judge

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's

order. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).

APPENDIX E

IN THE SUPREME COURT OF OHIO

Case No. 94-2467

THE STATE OF OHIO,
Appellee,

v.

FREDERICK WHITE,
Appellant.

February 7, 1995, Submitted
April 26, 1995, Decided

Appeal from the Court of Appeals for Cuyahoga County,
No. 57944.

According to the court of appeals' opinion, appellant, Frederick White, was convicted of aggravated murder and felonious assault with firearm specifications. The appellate court vacated one of the felonious assault counts, but affirmed the remaining convictions. State v. White (Jan. 31, 1991), Cuyahoga App. No. 57944, unreported, 1991 WL 8581. It is undisputed that on February 16, 1994, appellant filed an application to reopen his appeal pursuant to App.R. 26(B), alleging ineffective assistance of appellate counsel. Attached to the application was counsel's affidavit stating that any delay in filing the application was due to counsel's heavy work load and was not caused by appellant. Nevertheless, the court of appeals held that appellant had

failed to establish good cause for filing the application more than ninety days after the appellate judgment was journalized, as required by App.R. 26(B)(1) and (2)(b). The court also held that appellant's claims had previously been raised on direct appeal and were, therefore, res judicata. Appellant now appeals to this court.

Stephanie Tubbs Jones, Cuyahoga County Prosecuting Attorney, and *George J. Sadd*, Assistant Prosecuting Attorney, for appellee.

David H. Bodiker, Ohio Public Defender, *Kort Gatterdam*, Assistant Public Defender, and *Gloria Eyerly*, Chief Counsel, for appellant.

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER AND COOK, JJ., concur. WRIGHT, J., dissents.

Per Curiam. The judgment of the court of appeals is affirmed for the reasons stated in its opinion.

Judgment affirmed.

WRIGHT, J., dissenting. I must respectfully dissent because I believe that this court should not take such a rigid attitude toward standards that will suffice for "good cause."

As evidence of good cause, defense counsel in this case filed an affidavit that stated, in part: "Due to our office's overwhelming caseload and my personal heavy caseload, I was unable to review the merits of Mr. White's case until late 1993. The delay in filing this application is an unavoidable consequence of our statutory mandate (R.C. 120.06) to review any inmate['s] claim that he is unlawfully

incarcerated. The delay was not caused by Appellant, Rick White."

The court of appeals held that this did not establish good cause for the untimely filing of an application for reopening. The court premised its reasoning on the fact that counsel is charged with full knowledge of the time limitations of App.R. 26(B). *State v. Klein* (Apr. 8, 1991), Cuyahoga App. No. 58389, unreported, 1991 WL 41746, reopening disallowed (Mar. 15, 1994), affirmed (1994), 69 Ohio St.3d 1481, 634 N.E.2d 1027. The court further reasoned that the lack of counsel does not excuse an applicant from filing a timely application for reopening. *State v. McCarter* (Apr. 8, 1993), Cuyahoga App. No. 62346, unreported, 1993 WL 107800, reopening disallowed (Aug. 12, 1994).

The application of both premises defies the realities present in our system and ignores the concept of justice.

It was not lack of knowledge of the time limitations of App.R. 26(B) that prevented counsel from filing the application for reopening within ninety days. It is well known that the Office of the Public Defender is understaffed and overworked with a heavy caseload. For numerous reasons, it is almost impossible for a public defender to meet the ninety-day requirement for filing an application for reopening in this type of case. Particularly relevant is the fact that most public defenders do not even *receive* the request for assistance of counsel until after the ninety-day requirement has expired. Also relevant is the fact that with over forty thousand potential clients, it defies reality to believe that the Public Defender will be able to identify, review and file an application for reopening within ninety days. The effect of the rigid application proposed by the court of appeals and

affirmed by the majority is that an indigent, incarcerated, and uncounseled appellant is being denied the fundamental constitutional rights that App.R. 26(B) was designed to protect.

As for the assertion that lack of counsel does not excuse the untimely application for reopening, the majority places a great deal of faith in the ability of a layperson, within ninety days, to realize that his appellate counsel was ineffective, realize why the appellate counsel was ineffective, and understand how to ask the court of appeals to address the ineffectiveness. All this when, in most cases, the indigent incarcerated inmate does not receive the court of appeals' decision from his or her appellate lawyer in a timely fashion, if at all. My word, what a statute!

The court of appeals quotes, at length, *Drake v. Bucher* (1966), 5 Ohio St.2d 37, 34 O.O.2d 53, 213 N.E.2d 182, which discusses the importance of adhering to the rules of the court. I agree with the premise that in the interest of judicial economy and for the protection of individuals, the rules of the court must be followed. However, the rules should not be followed so rigidly that fundamental constitutional rights are jeopardized or destroyed as in the case before us.

Accordingly, I must respectfully dissent.

APPENDIX F

IN THE COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 57944

STATE OF OHIO,
Plaintiff-Appellee,

v.

FREDERICK WHITE,
Defendant-Appellant.

Filed: October 19, 1994

JOURNAL ENTRY

Applicant, Frederick White, has filed an application for reopening pursuant to App. R. 26(B). The applicant is attempting to reopen the appellate judgment that was rendered in *State v. White* (Jan. 31, 1991), Cuyahoga App. No. 57944, unreported. The judgment of this Court affirmed the applicant's conviction for the offenses of aggravated murder (R.C. 2903.01) and felonious assault (R.C. 2903.11) with firearm specifications.

As mandated by App. R. 26(B)(2)(b), an application for reopening shall establish "a showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment." Herein,

the applicant seeks to reopen the appellate judgment that was journalized on February 11, 1991. The application for reopening, however, was not filed with this Court until February 16, 1994, more than three years after journalization of the appellate judgment, one year and eleven months after the announcement of *State v. Murnahan* (1992), 63 Ohio St.3d 60, and more than seven months after the effective date of App. R. 26(B). On its face, the application for reopening is untimely.

In an attempt to establish good cause for the untimely filing of the application for reopening, applicant's counsel has filed an affidavit which provides in pertinent part that:

> I was assigned the case of *State v. Frederick White* in 1991. I have reviewed the appellate documents, trial documents and entire trial transcript. Due to our office's overwhelming caseload and my personal heavy caseload, I was unable to review the merits of Mr. White's case until late 1993. The delay in filing this application is an unavoidable consequence of our statutory mandate (R.C. 120.06) to review any inmates claim that he is unlawfully incarcerated. The delay was not caused by Appellant, Rick White.

This Court has specifically held that an applicant's ignorance of App. R. 26(B) or its procedural requirements will not establish good cause for the untimely filing of an application for reopening. *State v. Klein* (April 8, 1991), Cuyahoga App. No. 58389, unreported, reopening disallowed (March 15, 1994), Motion No. 49260, affirmed (1994), 69 Ohio St.3d 1481. In addition, this Court has established that the lack of counsel to prosecute an

application for reopening does not excuse an applicant from filing an untimely application for reopening. *State v. McCarter* (April 8, 1993), Cuyahoga App. No. 62346, unreported, reopening disallowed (Aug. 12, 1994), Motion No. 43167 at 2-3. Based upon *Klein* and *McCarter*, we now hold that an "office's overwhelming case load and my personal heavy caseload" does not establish good cause for the untimely filing of application for reopening as brought pursuant to App. R. 26(B). It must also be noted that applicant's counsel, as a member of the bar, is charged with full knowledge of the time limitations of App. R. 26(B) and that counsel has not set forth any other rationale which establishes good cause for the untimely filing of the application for reopening.

> There is no excuse for the failure of any member of the bar to understand or to comply with the rules of this court. They are promulgated so that causes coming before the court will be presented in a clear and logical manner, and any litigant availing himself of the jurisdiction of the court is subjected thereto. Not to be minimized is the necessity of compliance as an accommodation to the correct dispatch or the court's business. But our over-arching concern is that the legitimate interests of litigants be protected to the utmost. To this end, our profession is committed, and adherence to our rules should be dedicated.
>
> In order to promote justice, the court exercises a certain liberality in enforcing a strict attention to its rules, especially as to mere technical infractions. But a substantial

> disregard of the whole body of these rules cannot be tolerated. As observed in *Sullivan v. Holbrook*, 211 Mo. 99, 104, 109 S.W. 668:
>
> "The rules of appellate practice in hand are simple and plain. They fill no office of mere red tape, or as a show of surface routine. To the contrary, they have substance, and carry on their face the obvious purpose to aid appellate courts in getting at the right of a cause. Hence, apparently, they be-speak the dignity arising from obedience. If they are not to be obeyed, they should be done away with once for all. A just rule, fairly interpreted and enforced, wrongs no man. Ostensibly enforced, but not, it necessarily wrongs some men, *viz.*: those who labor to obey it – the very ones it should not injure. If the rules in question stand for something and are ever to be enforced, they should be put in motion in this case. ***

Drake v. Bucher (1966), 5 Ohio St.2d 37, at 39.

Thus, we find that the applicant's application for reopening is untimely and must be denied. *State v. Otis* (Jan. 23, 1992), Cuyahoga App. No. 59685, unreported, reopening disallowed (July 6, 1994), Motion No. 52993; *State v. Miller* (July 2, 1992), Cuyahoga App. No. 60678, unreported, reopening disallowed (Feb. 22, 1994), Motion No. 48064; *State v. Shepherd* (April 22, 1982), Cuyahoga App. No. 44014, unreported, reopening disallowed (Feb. 28, 1994), Motion No. 49026.

Notwithstanding the fact that the application for reopening is untimely, a substantive review of the applicant's supporting memorandum clearly demonstrates that *res judicata* prevents the reopening of the appellate judgment that was rendered in *State v. White* (Jan 31, 1991), Cuyahoga App. No. 57944, unreported. The doctrine of *res judicata* prohibits a defendant from relitigating any defense or claim of error that has been previously raised upon direct appeal. *State v. Perry* (1967), 10 Ohio St.2d 175. It should also be noted that *State v. Murnahan* (1992), 63 Ohio St.3d 60, upon which App. R. 26(B) is based, provides that ordinary principles of *res judicata* are applicable to an application for reopening unless "circumstances render the application of *res judicata* unjust." *State v. Murnahan*, supra at 66. See, also, *State v. Graham* (June 12, 1975), Cuyahoga App. No. 33350, unreported, reopening disallowed (July 21, 1994), Motion No. 52742; *State v. Barnes* (March 24, 1986), Cuyahoga App. No. 50318, unreported, reopening disallowed (March 4, 1994), Motion No. 36463.

In an attempt to reopen the appellate judgment that was rendered by this Court, the applicant raises four proposed assignments of error which appellate counsel allegedly failed to argue upon appeal. These four proposed assignments of error address the following issues: (1) other acts testimony (Evid. R. 404); (2) hearsay evidence (Evid. R. 801); (3) extensive evidence to impeach defendant's character (Evid. R. 608); and (4) prosecutorial misconduct.

This Court, however, has previously examined upon direct appeal each of the applicant's four proposed assignments of error. Through the fourth, fifth and sixth assignments of error as raised upon direct appeal, this Court reviewed the issues of other acts testimony, hearsay evidence and extrinsic evidence to impeach defendant's character. In

addition, this court addressed the issue of prosecutorial misconduct in light of the harmless error rule (Crim. R. 52(A)) and held that:

> Although the prosecutor repeatedly violated the rules of evidence in this case, we are compelled to find these errors harmless in light of the overwhelming evidence of the defendant's guilt. *State v. Abrams* (1974), 39 Ohio St.2d 53; *Chapman v. California* (1967), 386 U.S. 18. The record demonstrates the victim identified her assailant as her husband, Rick. The deceased's declarations in this regard were unassailed by the defense. Kozel's eyewitness identification placed the defendant at the nursing home minutes before the shooting and Glenn identified the defendant as the man who shot White. Further Brown and Laster placed the defendant in Cleveland in the late afternoon before White's death. Brown testified the defendant was looking for White. Finally, the victim's daughter averred the defendant threatened, on the evening before the slaying, "to do something" bad to her mother.
>
> We are compelled to caution the prosecutor against the repeated violation of evidentiary rules. Although his misconduct was harmless in the instant case, the effect of such cumulative error in a weaker case can result in reversal. See, e.g., *State v. Oliver* (Oct. 17, 1985), Cuyahoga App. No. 49613, unreported at 12-24.

State v. White, *supra* at 16.

Res judicata bars the further reconsideration of the issues of other acts testimony, hearsay evidence, extrinsic evidence to impeach defendant's character and prosecutorial misconduct. In addition, the applicant has failed to demonstrate that circumstances render the application of *res judicata* to the present prayer for reopening unjust.

The application for reopening is denied.

SPELLACY, P.J., and

DYKE, J., CONCUR.

s/James M. Porter
JAMES M. PORTER
JUDGE

JOURNALIZED: Oct. 19, 1994

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
SEP 8 2000
CLERK

No. 00-228

In the Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN,
Petitioner,

-vs-

FREDERICK WHITE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

DAVID H. BODIKER
Ohio Public Defender

KORT GATTERDAM
Assistant State Public Defender
Counsel of Record

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Assistant State Public Defender

Office of the Ohio Public Defender
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(614) 466-5394

COUNSEL FOR FREDERICK WHITE

10

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, FREDERICK WHITE, through undersigned counsel, respectfully requests leave to file his Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs or fees and to proceed *in forma pauperis* pursuant to Rule 39.

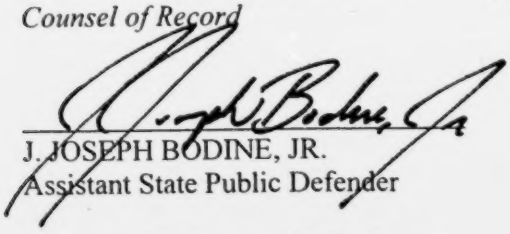
Petitioner was represented by state-appointed counsel on appeal to the Sixth Circuit pursuant to Ohio Rev. Code Ann. § 120.06. Petitioner's appeal to the United States Court of Appeals for the Sixth Circuit proceeded *in forma pauperis*.

Petitioner's affidavit in support of this motion is attached.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender

KORT GATTERDAM
Assistant State Public Defender
Counsel of Record



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AFFIDAVIT OF INDIGENCY

I, FREDERICK WHITE, being first duly sworn, depose and say that in support of my motion to petition for a Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of petitioning for a Writ of Certiorari are true.

1. Are you presently employed? NO

A. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

B. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received. 9/19/88 $650.00 per week

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? NO

A. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? NO

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property excluding ordinary household furniture and clothing? No

A. If the answer is yes, describe the property and state its approximate value.

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons. NA

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Frederick White
FREDERICK WHITE

Duly witnessed and sworn before me, a Notary Public, this 7th day of September, 2000.

NOTARY PUBLIC

NOTARIAL SEAL STATE OF OHIO

J. JOSEPH BODINE, ATTORNEY AT LAW
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.

No. 00-228

In the Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN,
Petitioner,

-vs-

FREDERICK WHITE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FREDERICK WHITE'S BRIEF IN OPPOSITION TO THE WARDEN'S PETITION FOR WRIT OF CERTIORARI

DAVID H. BODIKER
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COUNSEL FOR FREDERICK WHITE

QUESTIONS PRESENTED

1] Is Ohio Rule of Appellate Procedure 26(B) so inadequate and inconsistently applied by the Ohio courts that it may not serve as the basis for the procedural default of a claim presented in a petition for writ of habeas corpus?

2] Does a criminal defendant enjoy the right to the effective assistance of counsel on a first direct appeal of right from a criminal conviction?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

3. Ohio R. App. P. 26(B) (Rule 26(B)) is reproduced in the appendix to this brief in opposition.

4. Current and Former S. Ct. Prac. R. II(2)(D)(1) are reproduced in the appendix to this brief in opposition.

STATEMENT OF THE CASE AND FACTS

On February 16, 1989, the Cuyahoga County Grand Jury indicted Frederick White for one count of aggravated murder with a firearm specification, two counts of felonious assault with firearm specifications, and one count of having a weapon under disability. The State alleged that Mr. White shot and killed his ex-wife Kim Hawkins, as she was leaving her job, in the early morning hours of November 5, 1988.

On May 12, 1989, after a jury trial, Mr. White was found guilty on all counts and firearm specifications. On May 15, 1989, he was sentenced to twenty years to life for aggravated murder, three years for the firearm specification, and eight to fifteen years on each count of felonious assault. The sentences were imposed consecutively to one another.

Mr. White timely appealed to the Cuyahoga County Court of Appeals. On January 31, 1991, the court of appeals overruled Mr. White's assignments of error. State v. White, No. 57944 (Ohio App. Cuyahoga Co., Jan. 31, 1991). However, the court sua sponte ordered the trial court to vacate one of the convictions for felonious assault under the allied offenses doctrine. After his convictions were affirmed, Mr. White was without counsel until he wrote to the Office of the Ohio Public Defender.

Mr. White asked the Ohio Public Defender to review his case after the time had expired to file a timely motion for reconsideration in the court of appeals (ten days) or a timely appeal to the Ohio Supreme Court (thirty days). Pursuant to the Office of the Ohio Public Defender's statutory mandate (Ohio Rev. Code Ann. § 120.06), Mr. White's case was reviewed and it was determined that he was denied the effective assistance of appellate counsel.

On February 16, 1994, Mr. White, through counsel, elected to complete his direct appeal of right by filing an Application for Reopening with the court of appeals pursuant to Ohio v.

Murnahan, 584 N.E.2d 1204 (1992), and Ohio App. R. 26(B). White asserted four issues that appellate counsel failed to raise during the first component of White's direct appeal of right. On October 19, 1994, the court of appeals overruled Mr. White's claims. State v. White, Mot. No. 49174 (Ohio App. Cuyahoga Co., Oct. 19, 1994). Mr. White timely appealed to the Supreme Court of Ohio. On April 26, 1995, the Supreme Court of Ohio affirmed the court of appeals decision. State v. White, 647 N.E.2d 787 (1995).

Mr. White filed a petition for writ of certiorari with this Court. Mr. White's conviction became final on October 25, 1995, when this Court denied his the petition.

On December 27, 1995, Mr. White filed a petition for writ of habeas corpus with the United States District Court, Northern District, Eastern Division. Mr. White raised four grounds for relief. The Warden filed a Return of Writ asserting that Mr. White's claims were barred on the grounds of procedural default. On July 23 1996, the Magistrate Judge recommended that the claims be dismissed due to procedural default. Mr. White filed timely objections. On August 14, 1997, the District Court adopted the Magistrate's Report and Recommendation without analysis.

Mr. White was granted a certificate of appealability and pauper status by the United States Court of Appeals for the Sixth Circuit on March 16, 1998. The Sixth Circuit reversed the district court. While it declined to address the adequacy of Ohio App. R. 26(B), the court held that Mr. White could establish cause even if his claims were procedurally defaulted. The court remanded the case to the district court to determine whether Mr. White was prejudiced from appellate counsel's ineffectiveness.

The Warden petitioned the Sixth Circuit to rehear the case *en banc*, and the court summarily denied the petition. The Warden then petitioned this Court for a writ of certiorari. Mr. White now submits his brief in opposition.

REASONS WHY THE PETITION SHOULD BE DENIED

I. OHIO APPELLATE RULE 26(B) DID NOT PROVIDE MR. WHITE AND SIMILARLY SITUATED INDIVIDUALS WITH A FAIR AND REASONABLE OPPORTUNITY TO HAVE THEIR CLAIMS HEARD.

A. Appellate Rule 26(B) was not in effect until two years after Mr. White filed his application to reopen.

A state procedural rule that does not provide a habeas petitioner with an adequate opportunity to present a federal claim to the state courts constitutes an inadequate rule, and any state procedural default which is a product of that inadequate system should not be honored by the federal courts. See, e.g. Michel v. Louisiana, 350 U.S. 91, 93 (1955) (test in determining whether federal court will consider merits of a claim not presented to state court is whether the defendant had a reasonable opportunity to have the claim heard and determined by the state court); Reece v. Georgia, 350 U.S. 85, 89-90 (1955). If a state procedural requirement consistently prevents a "fairly presented" claim from being heard on the merits, the state procedures are inadequate. Kim v. Villalobos, 799 F.2d 1317, 1321 (9th Cir. 1986); Easter v. Endell, 37 F.3d 1343, 1345 (8th Cir. 1994).

In Ohio v. Murnahan, 584 N.E.2d 1204 (1992), the Supreme Court of Ohio determined that appellate ineffectiveness claims must be litigated as part of the direct appeal process and not in post-conviction proceedings. Prior to Murnahan, there was statewide inconsistency regarding where such claims should be presented. See Manning v. Alexander, 912 F.2d 878 (6th Cir. 1990).

Because of Murnahan, Ohio enacted Appellate Rule 26(B). Rule 26 (B) requires claims of appellate ineffectiveness to be filed within ninety days of the original court of appeals

decision affirming a conviction or an appellant must establish "good cause" for not filing the application within ninety days. Rule 26(B) went into effect on July 1, 1993.

Despite the purported effective date of Rule 26(B), the Supreme Court of Ohio's former S. Ct. Prac. R. II(2)(D)(1) divested the Ohio courts of appeals of jurisdiction to consider any action once a notice of appeal was filed in the Supreme Court of Ohio. "After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction...to rule on an application for reconsideration filed with the court of appeals pursuant to Rule 26 of the Rules of Appellate Procedure... ." (Emphasis added).

In Ohio v. Wogenstahl, 662 N.E.2d 16, 17 (1996), decided three years after Rule 26(B)'s enactment, the Supreme Court of Ohio expressly held that former S. Ct. Prac. R. II(2)(D)(1) trumped Rule 26(B) and divested the courts of appeals of jurisdiction to entertain Rule 26(B) applications. Because former S. Ct. Prac. R. II(2)(D)(1) specified that the courts of appeals retained jurisdiction only to rule on applications for reconsideration as opposed to applications to reopen, the supreme court held that the courts of appeals did not retain jurisdiction to rule upon an application for reopening under Rule 26(B). Id.; see also Ohio v. Howe, 652 N.E.2d 193 (1995). It was only after Wogenstahl that the Supreme Court of Ohio corrected the obvious conflict between Rule 26(B) and former S. Ct. Prac. R. II(2)(D)(1). Therefore, Rule 26(B) was not in effect until two years after Mr. White filed his application to reopen in the court of appeals.

Because Ohio courts of appeals did not have jurisdiction to address claims of appellate ineffectiveness until 1996, at the time Mr. White filed his application, the Rule 26(B) process for litigating appellate ineffectiveness claims provided only a theoretical remedy. See Marino v. Regan, 332 U.S. 561, 569-570 (1947). The Supreme Court of Ohio, through Rule 26(B), created

the exclusive remedy for raising appellate ineffectiveness claims, a delayed motion for reconsideration filed with the courts of appeals that was part and parcel of the original direct appeal of right. The Supreme Court of Ohio's own rule deprived the appellate courts of the jurisdiction they needed to entertain these appellate ineffectiveness claims. During this time period, within which Mr. White's case falls, Ohio did not provide appellants a reasonable opportunity to present their ineffectiveness claims. Thus, individuals like Mr. White, who had been deprived of their right to the effective assistance of appellate counsel, had no opportunity to be heard regarding those allegations.

B. At the time of Mr. White's Delayed Motion for Reconsideration was pending, the Ohio Courts did not consistently apply the ninety day time provision contained in Rule 26(B).

For the Warden to meet her burden of proof as to the affirmative defense of procedural default, she must demonstrate that the state procedural rule is a "firmly established and regularly followed state practice." Ford v. Georgia, 498 U.S. 411, 423-424 (1991); Reynolds v. Berry, 146 F.3d 345, 347 (6th Cir. 1998). The Warden's affirmative defense in the present case focuses upon Rule 26(B). She alleges that Mr. White did not comply with the following time limitations contained within the Rule: "An Application shall be filed in the court of appeals where the appeal was decided within ninety days from the journalization of the appellate judgment unless the appellant shows good cause for filing at a later time." Ohio R. App. P. 26(B)(1).

The Rule contains two filing provisions: 1) the application must be filed within ninety days or 2) the appellant must show "good cause" for the untimely filing. As will be demonstrated herein, the Warden cannot meet her burden of proof because the state courts have failed to consistently apply either filing provision.

Rule 26(B) is very concise, applications "shall be filed in the court of appeals where the appeal was decided within ninety days . . ." or the appellant must show good cause. The standard is very simple, easy to administer and not subject to conflicting interpretations. The time limitation is mandatory unless the appellant can show good cause.

Despite the objective nature of the rule and its mandatory application, Ohio courts have inconsistently applied this rule. In the following cases, the Ohio courts ignored the ninety day time limitation and reached the merits of delayed applications without showing good cause despite the fact that the applications were untimely. Ohio v. Smith, 640 N.E.2d 813 (1994)(five years); Ohio v. Timmons, 640 N.E.2d 814 (1994)(ten years); Ohio v. Bonnell, 643 N.E.2d 108 (1994)(three years); Ohio v. Hamblin, 643 N.E.2d 545 (1994)(eight years); Ohio v. Hull, 643 N.E.2d 546 (1994)(three years); Ohio v. McKenzie, 664 N.E.2d 926 (1996)(four years); Ohio v. Dumas, 663 N.E.2d 925 (1996)(four years); Ohio v. Doles, 665 N.E.2d 197 (1996)(two years); Ohio v. Sabo, 666 N.E.2d 560 (1996)(ten years) and Ohio v. Jones, 667 N.E.2d 384 (1996)(five years).

In numerous cases, Ohio courts disregarded the fact that applications were filed several years outside the ninety day requirement. These holdings are to be contrasted with the cases in which Ohio courts determined that the application was untimely because it was filed one day or months outside the ninety day time period. Ohio v. Winstead, 658 N.E.2d 722 (1996)(one day); Ohio v. Simpson, 666 N.E.2d 1118 (1996)(several days); Ohio v. Cobb, 643 N.E.2d 543 (1994) (ninety-seven days); Ohio v. Ballard, 643 N.E.2d 1147 (1994) (ninety seven days); Ohio v. Dever, 654 N.E.2d 1249 (1995) (five months); Ohio v. Whalen, 660 N.E.2d 1174 (1996) (nine months); Ohio v. Peeples, 643 N.E.2d 1112 (1994) (nine months); Ohio v. Eads, 652 N.E.2d 999

(1995)(nine months); Ohio v. Chubb, 652 N.E.2d 709 (1995)(ten months); Ohio v. Houston, 652 N.E.2d 1018 (1995)(one year); Ohio v. Lura, 661 N.E.2d 1085 (1996)(one year).

The inconsistent application of the ninety day provision is best highlighted by two cases decided by the Supreme Court of Ohio on the same day. In Ohio v. Winstead, 658 N.E.2d 722 (1996), the court determined that the filing of the motion one day beyond the ninety day provision constituted an untimely filing. The same day, in Ohio v. Green, 658 N.E.2d 721 (1996), the court ignored the fact that an application was filed fourteen days beyond the Rule and reviewed the merits of the issues presented.

The contradictory results demonstrate that the Ohio courts have been unable to consistently apply the objective ninety day requirement of Rule 26(B). Thus, the ninety day requirement of Rule 26 cannot serve as an adequate and independent basis for a procedural default because it is not a firmly established and regularly followed state practice.

C. At the time Mr. White's Rule 26(B) Application was pending, Ohio courts inconsistently applied the good cause exception to the ninety day rule provision contained in Rule 26(B).

Rule 26(B) grants appellate courts discretion to forgive a violation of the ninety day rule but only if the appellant can demonstrate good cause. The cases cited in this subsection will demonstrate that the Ohio courts have also applied the good cause provision in an inconsistent manner. See White v. Schotten, 201 F.3d 743, 751, (2000). The inconsistency on which Mr. White relies is not one where one appellant is determined to have proven good cause and another appellant is determined not to have proven good cause. This type of inconsistency is to be expected and warranted if the state courts are examining the facts unique to each case. Indeed, it is a different type of inconsistency that renders the Rule inadequate. While the state courts conclude in some cases that a particular fact can constitute good cause, in other cases the

appellate courts conclude that the very same factor can never constitute good cause. These types of inconsistent rulings render the Rule inadequate for federal habeas purposes.

The facts most frequently cited as the basis for good cause by untimely appellants during the time of Mr. White's application was the enactment of Rule 26(B) itself. Numerous appellants complained that they could not be expected to comply with the time limits contained in Rule 26(B) because it had not been enacted when the appellate courts decided their cases. Several Ohio courts found that the enactment of the Rule was good cause. Ohio v. White, 652 N.E.2d 1020 (1995); Ohio v. Spaulding, 643 N.E.2d 112 (1994); Ohio v. Peeples, 643 N.E.2d 1112 (1994). In other cases, the courts held that delayed applications could have been filed prior to the enactment of Rule 26(B) pursuant to Ohio R. App. P. 14, and therefore, the enactment of the Rule was not good cause. Ohio v. Reddick, 647 N.E.2d 784 (1995); Ohio v. Spisak, 652 N.E.2d 719 (1995); Ohio v. Wickline, 658 N.E.2d 1052 (1996); Ohio v. Williams, 659 N.E.2d 1253 (1996).

Pro se appellants during the relevant time period often cited to their ignorance of the law and lack of access to legal material as good cause. At least one Ohio court determined that pro se status constitutes good cause. Ohio v. Dillon, No. 725 1996 WL 467303 (Mont. Ct. App. Aug. 15, 1996). Other courts rejected this argument. Ohio v. Thrower, 643 N.E.2d 1149 (1994); State v. Witlicki, 658 N.E.2d 275 (1996).

Other appellants cited to their issues and that they had colorable merit. Some courts adopted this reasoning as supporting good cause. Ohio v. Sparks, No. C-84-143 (Lucas Ct. App. Feb. 11, 1997); Ohio v. Williams, 1995 WL 338613, No. 88-J-26 (Jefferson Ct. App. June 1, 1995); Ohio v. Flowers, 1998 WL 456453, No. C-92-337 (Lucas Ct. App. July 10, 1998). One court excused the failure to comply with the ninety day provision because the application

claimed that appellate counsel was ineffective. Ohio v. Newlins, No. 87AP-222, 1993 WL 308390 (Franklin Ct. App. Aug. 5, 1993). If this were the proper test to determine "good cause," then all untimely applications would receive a merits review because the sole purpose of Rule 26(B) is to permit the litigation of appellate ineffectiveness claims.

Appellants often cited for good cause their inability to access their trial transcripts to identify the issues that were omitted from their direct appeals. Rule 26(B) mandates that the relevant portions of the transcript be attached to delayed applications. In Ohio v. Everette, 658 N.E.2d 720 (1996), the court ruled that under certain circumstances "great difficulties in obtaining a copy of the transcript could constitute good cause." In other cases, great difficulty in obtaining a transcript was not "good cause" if the issue could have been raised without access to a transcript. Ohio v. Bell, 652 N.E.2d 191 (1995); Ohio v. Houston, 652 N.E.2d 1018 (1995). Subsequently, the Supreme Court of Ohio ruled that if the relevant parts of the transcript were not attached to the delayed application, then the application was procedurally barred. Ohio v. McNeill, 700 N.E.2d 613 (1998). Finally, the Supreme Court of Ohio ruled that the courts of appeals are not required to provide an indigent appellant with a copy of his transcript to permit compliance with the rule. Ohio v. Nickelson, 661 N.E.2d 168 (1996).[1]

Some appellants cited as good cause the failure of their counsel to timely notify them of their adverse decisions in the courts of appeals. Appellants reasoned that this lack of timely notification precluded them from complying with the ninety day time period. Some Ohio courts accepted this lack of timely notification as "good cause." Ohio v. Everette, 658 N.E.2d 720 (1996); Ohio v. New, No. 94APA 10-1547 (Franklin Ct. App. Dec. 3, 1996).

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[1] McNeill and Nickelson violate the constitution by reminding one of "the 'age-old problem' of '[p]roviding equal justice for poor and rich, weak and powerful alike.'" M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996), citing to Griffin v. Illinois, 351 U.S. 12, 16 (1956).

Finally, some appellants during the relevant time period cited to the malfeasance or nonfeasance of their Rule 26(B) counsel as good cause. Some Ohio courts under some circumstances found that Rule 26(B) counsel's ineffectiveness could establish good cause. Ohio v. Bort, No. 96CA 006597 (Lorain Ct. App. Oct. 30, 1997). Other courts rejected the theory that the ineffectiveness of Rule 26(B) counsel could ever constitute good cause. Ohio v. Pierce, 659 N.E.2d 1252 (1996); Ohio v. White, 647 N.E.2d 787 (1995); Ohio v. Williams, 659 N.E.2d 1253 (1996); Ohio v. Colwell, 660 N.E.2d 1173 (1996).

As demonstrated by the numerous appellate decisions above, the state courts have unfettered discretion to pick and choose which cases they will accept for review. Indeed, some Ohio appellate courts apply a standard under which "good cause" will never be found, others employ a standard under which "good cause" will always be found, and still others ignore the "good cause" requirement altogether and proceed instead to the actual merits of the applicant's claims.

California, like Ohio, had decreed an artificial ninety-day time period for reopening appeals to assert new claims of error, subject to a "good cause" exception. See Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996). The Ninth Circuit found that there was no procedural bar in federal habeas because at the time of Morales' state court decision, because there were no clear guidelines for determining when a petitioner could file his petition beyond the ninety-day filing period. In addressing the "good cause" component, the court stated the following:

> We must emphasize that the issue here is not whether the State is allowed to invoke its rule irregularly for its own purposes. The question is whether a State rule that is applied only randomly may preclude a federal court from entertaining a petitioner's federal claim on the merits. We conclude that the answer is "no."

Morales, 85 F.3d at 1392.

The state courts of New Mexico have a procedural rule similar to Rule 26(B) in the sense that it precludes review of a question not properly preserved unless the courts "exercise discretion to consider fundamental rights that have been infringed without preservation of error." Gutierrez v. Moriarty, 922 F.2d 1464, 1470 (10th Cir. 1991). In refusing to recognize New Mexico's rule as adequate, the Tenth Circuit cited to the fact that there were no cases articulating the parameters within which New Mexico courts could exercise discretion. Id. at 1470 citing Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 233-34 (1969).

When faced with sporadic and inconsistent applications of state procedural rules, other circuits have refused to apply a procedural bar to the applicant's constitutional claims. King v. Puckett, 1 F.3d 280, 283-84 (5th Cir. 1993); Smith v. Black, 970 F.2d 1383, 1386-88 (5th Cir. 1992). Grubbs v. Delo, 948 F.2d 1459 (8th Cir. 1991); Delap v. Dugger, 890 F.2d 285, 300 (11th Cir. 1989).

The Supreme Court of Ohio has never considered or provided direction to Ohio appellate courts regarding the definition of "good cause." Without that direction, the Ohio appellate courts have inconsistently applied the "good cause" standard. Thus, the "good cause" component of Rule 26(B) cannot serve as an adequate and independent basis for a procedural default because it is not a firmly established and regularly followed state practice.

Because Ohio R. App. P. 26(B) is inadequate and has not been consistently applied by the Ohio courts, it may not cause the procedural default of Mr. White's claims. The Sixth Circuit declined to fully address Mr. White's arguments related to the adequacy of the Rule, and he reasserts those arguments here. If the Rule itself is inadequate, then Mr. White need not assert cause for the procedural default of his claims.

II. A CRIMINAL DEFENDANT ENJOYS THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON A DIRECT APPEAL OF RIGHT, AND THE STATES ARE FREE TO STRUCTURE THE DIRECT APPEAL PROCESS AS THEY SEE FIT.

A. This case does not present a question of great importance or scope worthy of certiorari review.

The Sixth Circuit declined to address the adequacy of Rule 26(B) finding instead that even if the rule were sufficiently adequate to invoke a procedural default of White's claims, he could nevertheless establish cause for their default. And even though the Rule itself is inadequate, one thing is certain, in Ohio, claims of appellate ineffectiveness must be raised on direct appeal and are not cognizable in any form of post-conviction proceeding. Because those claims may only be asserted in proceedings that are part of a first, direct appeal of right, they are subject to the Sixth and Fourteenth Amendment guarantees that an appellant be afforded the right to the effective assistance of counsel.

At the urging of the Ohio Attorney General, Ohio created a bifurcated direct appeal process designed to address claims of error arising from a criminal trial as well as claims of ineffective assistance of appellate counsel. Prior to 1992, claims of appellate ineffectiveness were addressed in a variety of ways in Ohio. See Manning v. Alexander, 912 F.2d 878 (1990). In 1992, the Supreme Court of Ohio decided Ohio v. Murnahan, 584 N.E.2d 1204 (1992), in which the court "emphatically held" that claims of appellate ineffectiveness were not cognizable in any form of post-conviction proceeding. See White v. Schotten, 201 F.3d 743, 752 (2000). Rather, the court held, claims of appellate ineffectiveness must be decided in the context of the direct appeal and be pursued through an Application to Reopen.

During the Murnahan proceedings in the Supreme Court of Ohio, the Ohio Attorney General entered an appearance as a friend of the court and argued on behalf of the State of Ohio.

In the brief, the Ohio Attorney General vehemently argued that these claims of appellate ineffectiveness could not be raised in post-conviction proceedings. (See Warden's Amicus Brief to the Supreme Court of Ohio, A-22 - A-40.) The attorney general argued that not only were appellate ineffectiveness claims not cognizable in post-conviction, but they "must be presented in the chain of direct appeal." (Warden's Amicus Brief, p.4, A-30.). The very basis of the Ohio Attorney General's argument was to protect Ohio's interest in the finality of its criminal judgments from federal habeas corpus intervention:

> The Ohio Attorney General represents the State's interests in collateral attacks on criminal convictions which name as the respondent a state official, such as the Warden of the correctional facility at which the petitioner is detained. This includes all Ohio prisoners' petitions for federal habeas corpus relief.
>
> As explained herein, Ohio's procedural rules for handling claims of ineffective assistance of appellate counsel are important for determining the procedural posture of the same allegations in federal habeas corpus. The decision below indicates that at least some room for debate exists in Ohio as to the proper state procedural vehicle for raising claims of appellate ineffectiveness. To the extent Ohio procedural law is unclear, federal courts may hear such claims in the first instance, despite the refusal of Ohio courts to have reviewed them. *This leads to a lack of respect for Ohio procedural requirements, both by federal courts and prospective federal litigants.* Litigants aiming for federal habeas review have little incentive to obey Ohio procedural requirements, secure in the knowledge that the merits of their claims will be addressed by federal courts anyway.

(Amicus Brief, p.1, A-27,emphasis added.)

Based upon the attorney general's argument, Applications for Reopening were made "part of the chain of direct appeal" by the Supreme Court of Ohio, and since then, direct appeals from criminal convictions in Ohio have been conducted in two parts. The first leg of the direct appeal proceeds in the traditional sense commencing with a notice of appeal, proceeding then to briefing, argument and written opinion by the reviewing court. Appellants may then seek discretionary review in the Supreme Court of Ohio and ultimately with this Court. The criminal

conviction is not final, however, until the Ohio appellate court determines whether the individual was afforded the effective assistance of appellate counsel. The filing of the application to reopen renders the criminal conviction un-final until such time as the application to reopen is resolved. See Foster v. Edwards, 165 F.2d 27 (6th Cir. 1998)(unpublished).

If the appellant claims that he was denied the effective assistance of appellate counsel, an Application to Reopen pursuant to Ohio R. App. P. 26(B) may be filed in the appellate court within ninety days of the original decision or, any time thereafter, if the applicant can establish good cause for the delayed filing. The review process is controlled by the Ohio Rules of Appellate Procedure, is filed under the original case number and is decided by the original panel of appellate judges. The applicant may appeal an adverse decision, as a matter of right, to the Supreme Court of Ohio.

Having succeeded in creating the direct appeal process now in place for the very purpose of restricting habeas corpus review of Ohio cases, the Ohio Attorney General now complains to the federal courts that Rule 26(B) is unfair and somehow deserving of constitutional intervention. And rather than making this argument in the proper forum - the Ohio Legislature - the Ohio Attorney General is now asking this Court to intervene in state matters, disregard the direct appeal process Ohio has chosen to fashion, and force Ohio to create a review process that is not required or even contemplated by the United States Constitution.

B. The Warden should not be permitted to have her cake and eat it too.

The doctrine of judicial estoppel protects the integrity of the judicial process by preventing a party from taking a position inconsistent with a position successfully and unequivocally asserted by the same party in a prior proceeding. United States v. Owen, 54 F.2d 271 (6th Cir. 1995). Courts have used a variety of metaphors to describe the doctrine,

characterizing it as a rule against "playing 'fast and loose' with the court," "blowing hot and cold as the occasion demands," or "having one's cake and eating it too." Reynolds v. Comm'n of Internal Revenue, 861 F.2d 469, 472-73 (6th Cir. 1988). All of those metaphors fit here. The State's analysis is less an attempt to present an issue of constitutional magnitude to this Court than an attempt to rectify its own shortsighted, yet successful, attempt to change the structure of Ohio's review process, and it is done so only by blatantly misrepresenting to this Court the status of Ohio law.

Unable to point to any binding Ohio authority supporting its position, Petitioner relies on two miscellaneous dismissals from the Supreme Court of Ohio decided prior to the effective date of Ohio R. App. P. 26(B). The Warden completely ignores the entire basis of the Murnahan decision and instead cites two miscellaneous dismissals for the erroneous proposition that an Application to Reopen is a post-conviction matter. See Ohio v. Robinson, 660 N.E.2d 472 (1996); Ohio v. Sproat, 656 N.E.2d 342 (1995). Aside from the fact that Robinson and Sproat are miscellaneous dismissals that offer no guidance, and Murnahan is the seminal case governing applications to reopen, later cases have further clarified that App.R. 26(B) proceedings are part of the direct appeal process.

In early 1996, when Robinson was issued, the treatment of appellate ineffectiveness claims was a disaster due to conflicting rules that were still on the books. While the whole purpose of Murnahan was to take appellate ineffectiveness claims out of Ohio's post-conviction process, an Ohio Supreme Court Practice Rule remained that divested the appellate courts of jurisdiction to hear the claims. Former S. Ct. Prac. R. II(2)(D)(1). Thus, at the time of Robinson and Sproat, litigants with appellate ineffectiveness claims were being turned away from the appellate courts because the courts did not have jurisdiction and they were being turned away

from the trial courts because appellate ineffectiveness claims were no longer part of Ohio's post-conviction process pursuant to Murnahan and App. R. 26(B). See Ohio v. Howe, 652 N.E.2d 193 (1995); Ohio v. Wogensthal, 662 N.E.2d 16 (1996).

Finally, in April of 1996, the Supreme Court of Ohio reaffirmed that appellate ineffectiveness claims were not part of the post-conviction process. Former S. Ct. Prac. R. II(2)(D)(1) was amended so that appellate courts would have jurisdiction to hear ineffective assistance of appellate counsel claims. That process, according to the Supreme Court of Ohio and the Sixth Circuit, is the continuation of a criminal defendant's first appeal of right.

In Ohio v. Gillard, 714 N.E.2d 400 (1999), the Supreme Court of Ohio recognized that the App. R. 26(B) procedure was part of direct appeal. In Gillard, Ohio had moved the court to set an execution date upon denial of Mr. Gillard's App. R. 26(B) motion. The court denied the state's motion holding that Mr. Gillard was entitled to a stay of execution to permit him to pursue his petition for writ of certiorari to this Court. Traditionally, the Supreme Court of Ohio has granted stays of execution only to pursue a petition for certiorari after direct appeal is complete and not after the indirect or collateral review is completed. If rule 26(B) were a post-conviction matter, a stay would not have been granted. Additionally, the Supreme Court of Ohio has held that counsel should be appointed to assist with the application to reopen pursuant to App. R. 26(B). Ohio v. Getsy, 721 N.E.2d 117 (1999) (case remanded for the appointment of counsel "to represent appellant for purposes of an application for reopening.").

Ohio has chosen to structure the direct appeal process in this manner, and as a matter of comity, the Sixth Circuit respected Ohio's authority to define the process by which direct appeals are conducted. Far from creating a new rule of constitutional law, the Sixth Circuit properly deferred to Ohio's authority to structure the appellate review process as it sees fit. Nowhere in

the Sixth Circuit's decision will this Court find any statement even vaguely approaching the Petitioner's assertion that the Sixth Circuit has single handedly amended the Bill of Rights to include a new and heretofore unrecognized constitutional right to the effective assistance of post-conviction counsel.

This is a matter of state law on which the Supreme Court of Ohio has spoken, and consistent with this Court's mandate that federal courts respect state procedural rules, the Sixth Circuit properly accepted Ohio's definition of a direct appeal and accorded it the respect it is due. Petitioner repeatedly cites to Coleman v. Thompson, 501 U.S. 722 (1991), in the hopes of luring this Court into the belief that the Sixth Circuit has ignored this Court's authority. But White v. Schotten has nothing to do with post-conviction cases; therefore, it does not implicate Coleman, let alone defy it.

C. White v. Schotten cannot conflict with the authority in other Circuits because almost every other state addresses appellate ineffectiveness claims in post-conviction proceedings.

White cannot possibly conflict with the authority of other Circuit courts because Ohio is one of only two states in the union that treats claims of appellate ineffectiveness as part of the direct appeal process Most states expressly deal with the claims as part of a collateral, post-conviction proceeding: Ala. R. Crim. P. 32.2; Alaska R. Crim P. 12.72.020; Ariz. R. Crim. P. 32.1; Ark. R. Crim P. 37.1 and 37.2; Colo. R. Crim. P. 35; Del. R. Crim. P. 61; Haw. R. Penal P. 40; Idaho R. Crim. P. 19-4901; Ill. R. Crim. P. 5/122-1; Ind. R. Post-Conviction 1, § 9; Iowa R. Civ. P. 60-1506; Ky. R. Crim. P. 11.42; La. R. Crim. P. Art. 924; Me. 15 M.R.S.A. §2129(1)(A); Md. Art. 27 § 645A Ann., Mass. R. Crim. P. 30; Mich. R. Crim. P. 6.502; Minn. Stat. § 590.05; Miss. Stat. §99-39-1; Mo. R. Crim. P. 29.15; Mont. R. Crim. P. 46-21-105; Neb. R. Crim. P. 29-3001; N.J. Court R. 3:22-1; N.D. stat 29-32.1-01; Okl. 22 Okl. St. Ann. § 1089; Or. ORS

138.510; Penn. 42 Pa. C.S. § 9541; R.I. Gen. Laws §10-9.1-1; S.C. § 17-27-10; Tenn. Code. Ann. § 40-30-201; Utah R. Civ. P. 65B; Vt. 13 V.S.A. § 7131; Va. R. Crim. P. § 8.01-654; Wis. Stat. § 809.30; Wyo. Stat. §§ 7-14-101-108. A few states address the claims in habeas corpus proceedings: Cal. 12 C.P.C. § 1475; Conn. R. Sup. Ct. P. 23-22; Ga. Stat. § 9-14-1; Kan. KSA 60-1507; Nev. N.R.S. §34-360; N.H. Title LV, Chpt. 534; N.M. R. Crim. P. 5-802; S.D. Codified Laws § 21-27-1.1; Texas Ar. 11.071; Wash. R. App. P. 16.4; W. Va Code § 53-4A-1. New York addresses the claim through a petition for writ of *coram nobis*, New York v. Bachert, 509 N.E.2d 318 (1987), and North Carolina courts review the claim through a pleading that is styled a "motion for appropriate relief," N.C. Laws §15A-1411. Florida is the only other state that accommodates appellate ineffectiveness claims in its rules of appellate procedure. Fla. R. App. P. 9.140(j).

Were Ohio like most other states that specifically define their process for deciding claims of appellate ineffectiveness as post-conviction matters, the Warden might be correct. But Ohio is different. Because appellate ineffectiveness claims are reviewed in the chain of a direct appeal of right, White v. Schotten no more conflicts with these other circuits than it conflicts with Coleman v. Thompson itself.

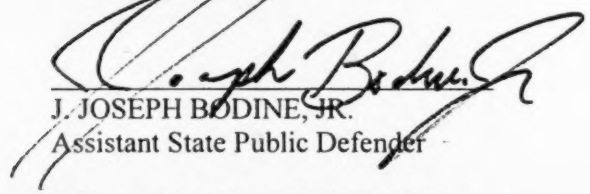
III. CONCLUSION.

Ohio Rule of Appellate Procedure 26(B) is inadequate; therefore, it cannot serve as the basis for a procedural default of Mr. White's claims. In addition, in Ohio, claims of appellate ineffectiveness lie within the exclusive province of the direct appeal courts. The structure of Ohio's direct appeal process is a matter best left to the discretion of the State of Ohio; consequently, Petitioner presents no legitimate reason to review the Sixth Circuit's decision.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender

KORT GATTERDAM
Assistant State Public Defender
Counsel of Record



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COUNSEL FOR FREDERICK WHITE

#119642

No. 00-228

In the Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN,
Petitioner,

-vs-

FREDERICK WHITE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO FREDERICK WHITE'S BRIEF IN OPPOSITION TO THE WARDEN'S PETITION FOR WRIT OF CERTIORARI

DAVID H. BODIKER
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COUNSEL FOR FREDERICK WHITE

Ohio R. App. P. 26

APP R 26 APPLICATION FOR RECONSIDERATION; APPLICATION FOR REOPENING

(A) Application for reconsideration

Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of an application for reconsideration shall not extend the time for filing a notice of appeal in the Supreme Court.

Parties opposing the application shall answer in writing within ten days after the filing of the application. Copies of the application, brief, and opposing briefs shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(B) Application for reopening

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to > App.R. 9 and > 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

(C) If an application for reconsideration under division (A) of this rule is filed with the court of appeals, the application shall be ruled upon within forty-five days of its filing.

Former Rule II(2)(D)(1) of the Supreme Court Rules of Practice:

S. Ct. Prac. R. II(2)(D)(1):
After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction, except to take action in aid of the appeal, to rule on an application for reconsideration filed with the court of appeals pursuant to Rule 26 of the Rules of Appellate Procedure, or to rule on a motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution.

Current Rule II(2)(D)(1) of the Supreme Court Rules of Practice:

S. Ct. Prac. R. II(2)(D)(1):
After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction, except to take action in aid of the appeal, to rule on an application timely filed with the court of appeals pursuant to Rule 26 of the Rules of Appellate Procedure, or to rule on a motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution.

EXHIBIT
B

*467303 NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

STATE of Ohio, Plaintiff-Appellee,

v.

Michael D. DILLON, Defendant-Appellant.

No. 725.
Court of Appeals of Ohio, Seventh District, Monroe County.
Aug. 15, 1996.

Application for Delayed Reconsideration.

Richard A. Yoss, Prosecuting Attorney, Woodsfield, for Plaintiff-Appellee.

Michael D. Dillon, pro se.

OPINION and *JOURNAL ENTRY*

PER CURIAM.

**1 On January 8, 1992, appellant was indicted on two counts. In count one, appellant was charged with aggravated burglary in violation of R.C. 2901.01. In count two, appellant was charged with rape in violation of R.C. 2907.02. Appellant entered pleas of not guilty and not guilty by reason of insanity.

On January 15, 1992, appellant's counsel filed a motion for examination, pursuant to R.C. 2945.371 and 2945.39, to determine his competence to stand trial, and his mental condition at the time of the offenses alleged in the indictment. On January 27, 1992, the trial court ordered that appellant be examined by the Forensic Diagnostic Center.

A report dated February 28, 1992, was prepared by the Forensic Diagnostic Center's clinical psychologist, and filed with the court on March 4, 1992.

On March 13, 1992, appellant entered a change of plea pursuant to a Crim.R. 11 agreement whereby appellee agreed to dismiss the charge of aggravated burglary in exchange for appellant's plea of guilty to the charge of rape. After the trial court accepted the plea agreement, appellant was sentenced to an indefinite term of not less then ten, nor more than twenty-five years.

On March 25, 1994, a motion to allow a delayed appeal was granted by this court. On November 15, 1995, oral argument was waived and the matter submitted to the court.

On January 12, 1996, this court affirmed the judgment of the trial court.

On May 24, 1996, appellant filed this application for delayed reconsideration as provided for under App.R. 26(B) and Rule 14(B).

In his application for delayed reconsideration, appellant alleges ineffective assistance of counsel and lists nine (9) separate assignments of error:

1. Appellate counsel was ineffective when he failed to present this assignment of error of ineffective assistance of trial counsel, when he coerced the appellant into a guilty plea, knowing the appellant was under the influence of antipsychotic drugs, and violated his due process clause and denied him a fair trial and violated his 6th and 14th Amendments to the United States Constitution of America.

2. Appellate counsel was ineffective when he never raised abuse and discretion of trial judge for not recusing himself from the bench when he had Parkinson Disease, and he was unfit to serve as judge, and violated this appellant's due process and his right to a fair trial, and appellate counsel violated the appellant's Sixth Amendment Constitutional right for failure to raise this error.

3. Appellate counsel was ineffective when he refused to raise the issue that the appellant was under the influence of drugs at the time of his guilty plea, in which he was coerced by his trial counsel to give the plea of guilty, which he did not know what he was doing at the time because of the antipsychotic drugs they had him on, violated his due process and his Sixth Amendment of the United States Constitution of America.

4. Appellate counsel was ineffective when he failed to raise ineffective assistance of trial counsel, for failure to object when trial court refused to hold a competency hearing under Crim.R. 11, in violation of R.C. 2945.37(A), denied him his Fifth, Sixth and Fourteenth Amendment of the United States Constitution of America, and Article I, Section 10 and 16 of the Ohio Constitution.

**2 5. Appellate counsel was ineffective when he raised the three assignments of error as separate

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issues they all involved the same error and were improperly argued, and denied the appellant effective assistance of appellate counsel, denied him his Sixth Amendment of the United States Constitution of America, and denied him his due process.

6. Appellate counsel was ineffective when he refused to raise ineffective assistance of trial counsel for failure to investigate into this case when their was no evidence that appellant was the perpetrator who did the robbery and rape, he was forced to plead guilty because of trial counsel's ineffectiveness, violated his Fifth, Sixth, and Fourteenth Amendment of the United States Constitution of America, Article I, Section 10 and 16 of the Ohio Constitution.

7. Appellant was prejudiced by and through the ineffective assistance of appellate counsel for not presenting all the issues and the main errors that occurred at trial, and refusing to bring these constitutional errors in question, to this honorable court of appeals when he was made aware of these errors by the appellant, and had informed him of them, violated his Sixth Amendment of the United States Constitution of America.

8. Appellate counsel was ineffective when he improperly argued that the appellant was not given a competency hearing under Crim.R. 11 that violated the appellant's due process and his Sixth Amendment of the United States Constitution of America which denied the appellant of effective assistance of appellate counsel.

9. Appellate counsel was ineffective when he failed to raise ineffective assistance of trial counsel, which denied the appellant of his Sixth Amendment that were assigned to his case during trial procedures because they had conflict of interest and prejudice towards the appellant, denied him a fair trial, in violation of his Sixth Amendment of the United State Constitution of America.

In appellant's original appeal to this court, appellant alleged three assignments of error, to-wit:

1. The appellant was denied due process of law as guaranteed by Article I, Sec. 16 of the Ohio Constitution and the Fourteenth Amendment of the United States Constitution when the trial court failed to hold a competency hearing.

2. The appellant was denied his right to the effective assistance of counsel as guaranteed by Article I, Sec. 10 of the Ohio Constitution and the Sixth Amendment to the United States Constitution when his counsel failed to request a competency hearing, failed to explore a sanity defense, and failed to conduct a reasonable investigation or defense.

3. The appellant was denied due process of law as guaranteed by the Article I, Sec. 16 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution as the proceedings resulting in his conviction were fundamentally unfair.

Appellant's assignments of error and claim of ineffective assistance of counsel are without merit.

**3 The relevant case on this issue is that of *State v. Murnahan* (1992), 63 Ohio St.3d 60, where, at paragraph three of the syllabus, the court stated:

"Where the time period for reconsideration in the court of appeals and direct appeal to the Supreme Court has expired, a delayed claim of ineffective assistance of appellate counsel must first be brought in an application for delayed reconsideration in the court of appeals where the alleged error took place, pursuant to App.R. 26 and 14(B), and if delayed reconsideration is denied then the defendant may file for delayed appeal in the supreme court, pursuant to section 8, Rule II of the Rules of Practice of the Supreme Court."

The applicable appellate rule in this case is that of App.R. 26 titled "Application for reconsideration; application for reopening."

"(B) Application for reopening.

"(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment *unless the applicant shows good cause* for filing at a later time. (Emphasis added).

"(2) An application for reopening shall contain all of the following:

" * * *

"(C) One or more assignments of error or arguments in support of assignments of error *that previously were not considered on the merits in the case by any appellate court* or that were considered on an

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incomplete record because of appellate counsel's deficient representation. (Emphasis added).

" * * *

"(5) An application for reopening shall be *granted if there is genuine issue* as to whether the applicant was deprived of the effective assistance of counsel on appeal."

Appellate Rule 14(B), which states "Enlargement or reduction of time", says:

"For good cause shown, the court, upon motion, may enlarge or reduce the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of the prescribed time. The court may not enlarge or reduce the time for filing a notice of appeal or a motion to certify pursuant to App.R. 25. Enlargement of time to file an application to reconsider pursuant to App.R. 26(A) shall not be granted except on a showing of extraordinary circumstances."

Thus, the threshold question is, did appellant show good cause for filing his Rule 26(B) Application for Delayed Reconsideration more than 90 days after the journalization of the appellate decision which occurred on January 12, 1996? See *State v. Wickline* (1996), 74 Ohio St.3d 369.

It would seem that appellant has met the good cause standard for filing over ninety days after the journalization of the appellant judgment in that appellant was a layman in filing his application for delayed reconsideration *pro se*. From the time of the January 12th date at which this court affirmed the judgment of the trial court until the filing of the application for delayed reconsideration we are looking at approximately 133 days. Allowing for time in the mail and notification of the defendant-appellant of his denial of his original appeal it would not seem unreasonable to allow the extra period to file this instant action.

**4 Accepting that appellant has shown good cause for his delay in filing for reconsideration, appellant must still bear the burden of establishing a "colorable claim" of ineffective assistance of counsel as required by App.R. 26(B)(5) and that his claims are not barred by *res judicata*.

The standard of review to be applied when assessing a defense request for reopening of appeal under App.R. 25(B)(5) is that of *Strickland v. Washington* (1984), 466 U.S. 668 and *State v. Bradley* (1989), 42 Ohio St.3d 136. See also the recent case of *State v. Reed* (1996), 74 Ohio St.3d 534.

The *Strickland* standard for ineffective assistance of counsel is that a defendant must demonstrate such serious errors of counsel that a defendant was prejudiced and, but for these errors, there was a reasonable probability that the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Therefore, to establish ineffective assistance of counsel, a defendant must show (1) deficient performance of counsel and (2) resulting prejudice to the defendant.

Also, appellant must bear the burden of showing that his claims are not barred by the doctrine of *res judicata*. Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceedings except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at trial, which resulted in that judgment of conviction or on an appeal from that judgment. See *State v. Perry* (1967), 10 Ohio St.2d 175, 176, paragraph nine of the syllabus.

Appellant's assignments of error all basically involve the following allegations:

1. That appellant was coerced into entering the guilty plea by his attorney when his attorney told him he would only receive a four year sentence and be released in two to two and one-half years;

2. That he was under the influence of anti-psychotic drugs at the time of the plea being entered;

3. That the trial judge should have recused himself since he had Parkinson's Disease;

4. That the trial court refused to hold a competency hearing;

5. That his attorney failed to investigate the case and there was no evidence that appellant was the perpetrator;

6. That his appellate attorney improperly argued the three original assignments of error in his first appeal;

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7. That there was a conflict of interest by his first attorney (who had himself removed from the case) who was a county judge and had signed appellant's arrest warrant, search warrant and set his bail.

In appellant's assignments of error one and two where appellant alleges that he was coerced into entering the guilty plea and under the influence of anti-psychotic drugs at the time of the plea, those arguments are *res judicata*. Clearly, both of those arguments could have been raised on his original appeal to this court.

**5 Both of those assignments of error also fail under the *Strickland* standard in that this court in its judgment and opinion of January 12, 1996 stated at page 4:

"In the present case, the record indicates that the trial court satisfied itself that appellant understood the nature of the charges against him and that he was informed as to the maximum penalties involved. (Tr. 4-7). The record further indicates that appellant acknowledged that he did understand the charges and penalties involved. (Tr. 4-7).

"In addition, the record indicates that Dr. Karpawich's evaluation was comprehensive. Dr. Karpawich's report discloses that appellant understood his rights and the nature of the proceedings against him."

Thus, appellant has failed to show that had these issues been raised in his appeal that there was a reasonable probability that the result of the trial would have been different.

In appellant's assignment of error 3 he alleges that the trial judge should have recused himself since he had Parkinson's Disease. Appellant has submitted no evidence and there is no evidence that Parkinson's Disease is a reason to recuse oneself. Parkinson's Disease is a nervous disorder and does not affect reasoning ability. In appellant's application to this court his Exhibit H was a letter from the Disciplinary Counsel of the Supreme Court of Ohio. In paragraph 2 of that report it states:

"The evidence in this matter does not suggest that Judge Burkhart is not capable of continuing to preside on the bench. While Judge Burkhart may suffer from Parkinson's Disease, it does not appear that the illness has affected his ability to review cases coming before him and make competent determinations pertaining to said cases."

Hence, the fact that the trial court judge had Parkinson's Disease has not been shown by the appellant to constitute prejudice to the defendant.

In assignment of error 4, the appellant alleges that the trial court had refused to hold a competency hearing and that his trial counsel was ineffective for failing to object to this denial of a competency hearing. This assignment of error is *res judicata* in that it was raised in assignment of error 1 at the appellant's original appeal to this court and fully addressed by this court. This court, in its January 12, 1996 decision at page 5 stated:

"The record herein reveals that appellant's plea was made knowingly, intelligently and voluntarily. Further, the record herein fails to reveal indicia of appellant's incompetency. As such, we find that appellant's first assignment of error is without merit."

In appellant's assignment of error 5 appellant alleges that his attorney failed to investigate the case and there was no evidence that appellant was the perpetrator. This assignment of error is also *res judicata*. Appellant's second assignment of error in his original appeal to this court stated in part: " * * * and failed to conduct a reasonable investigation or defense." Appellant's allegation that his trial court counsel failed to conduct a reasonable investigation into this case was reviewed by this court under the *Strickland* standard and this court found that assignment to be without merit. At page 6 of the appeal from the Common Pleas Court case, this court stated in part: " * * * there is no indication from a review of the record that appellant was prejudiced by any action or inaction of counsel."

**6. In appellant's assignment of error 6 appellant argues that appellate counsel improperly argued the three original assignments of error on his first appeal. This assignment of error is without merit and fails under the *Strickland* standard. There is no evidence that this method of argument by his appellate counsel was deficient. There was also no evidence that had his attorney argued the three assignments of error together the result would have been different. Also, this court addressed each of these assignments of error on appellant's original appeal.

In his last allegation, appellant alleges that there was a conflict of interest by his first assigned attorney (who had himself removed from the case) who was a county judge and had signed appellant's arrest

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warrant, search warrant and set his bail. This issue is also *res judicata* in that it could have been raised in his first appeal as of right to this court. An independent review of this issue indicates that appellant has not shown any specific instances where any action or inaction of his original court appointed attorney was deficient in any manner so as to prejudice the defendant-appellant in his original trial. Clearly there was a conflict of interest (this was admitted by the original attorney, see appellant's Exhibit I) but there is no indication that this conflict of interest resulted in any resulting prejudice to the defendant. Appellant's original attorney took extra precautions to insure that appellant would not be prejudiced until a new attorney could be appointed. (See appellant's Exhibit J).

Although appellant has seemingly met his burden of showing good cause for delaying filing of this Rule 26(B) Application for Delayed Reconsideration, he has not met the requirements of establishing a "colorable claim" of ineffective assistance of counsel. Also, many of his arguments in this case were argued on direct appeal and are *res judicata*.

This Application for Delayed Reconsideration is denied.

O'NEILL, P.J., and DONOFRIO and COX, JJ., concur.

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COURT OF APPEALS FILED
1997 FEB 11 A 11:45
LUCAS COUNTY, OHIO
HARRY BARLOS
CLERK OF COURTS

IN THE COURT OF APPEALS OF LUCAS COUNTY

State of Ohio — Appellee

Court of Appeals No. L-84-143

Trial Court No. CR 83-6315

v.

Joel Sparks

Appellant

DECISION AND JUDGMENT ENTRY

Decided: FEB 11 1997

* * * * *

Appellant has filed an application for reopening based upon a claim of ineffective assistance of appellate counsel.

Appellant was convicted of murder in December 1983; this court affirmed that conviction in 1984. See State v. Sparks (Dec. 14, 1984), Lucas App. No. L-84-143, unreported. Since that time, appellant's case was assigned for review by the Ohio Public Defender Commission. Appellee has filed no response to the motion.

App. R. 26(B)(5) provides that an application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of appellate counsel. An application for reopening must be filed within ninety days from journalization of the appellate judgment, unless the applicant shows good cause for filing at a later time. App.R. 26(B)(1).

EXHIBIT

JOURNALIZED

FEB 12 1997

In this case, appellant asserts that although trial counsel objected to an allegedly improper jury instruction as to the affirmative defense of self-defense and the duty to retreat from one's own home, his appellate counsel failed to argue such error on direct appeal. As a result of this failure, appellant contends that he was denied effective assistance of counsel.

In order to prove ineffective assistance of counsel, a defendant must show 1) that defense counsel's representation fell below an objective standard of reasonableness and 2) that counsel's deficient representation was prejudicial to defendant's case. State v. Bradley (1989), 42 Ohio St.3d 136, paragraph two of the syllabus, citing Strickland v. Washington (1984), 466 U.S. 668.

In this case, we conclude that the failure to assert an assignment of error as to the self-defense jury instruction creates a genuine issue as to whether the applicant was deprived of the effective assistance of appellate counsel. This proposed error was not discovered until recently reviewed by the Ohio Public Defender's office.

Accordingly, in the interest of justice, appellant's motion for reopening, limited to arguments related to the self-defense jury instructions, is well-taken and granted. The clerk for Lucas County Court of Appeals is granted 20 days from the date of this decision in which to reassemble the record. Appellant will have 20 days from the date of notice of transmission of the record in which to file his brief.

JOURNALIZED

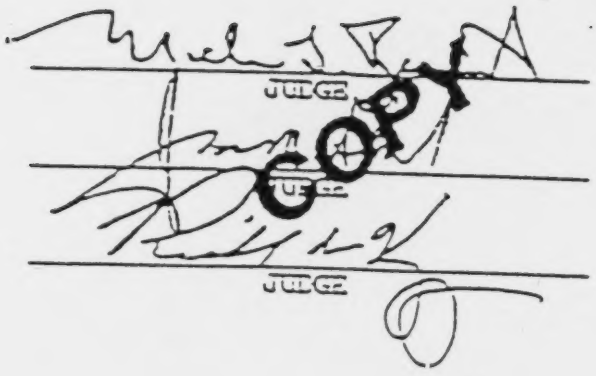
FEB 12 1997

Cassette 209 A-10

Melvin L. Resnick, P.J.

James R. Sherck, J.

Richard W. Knepper, J.
CONCUR.



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JOURNALIZED

FEB 12 1997

NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

STATE of Ohio, Plaintiff-Appellee,
v.
Samuel WILLIAMS, Defendant-Appellant.

88-J-26.

Court of Appeals of Ohio, Jefferson County.

June 1, 1995.

Criminal Appeal from Common Pleas Court Case No. 87-CR-70. Reversed and Remanded.

Stephen M. Stern, Pros Atty., Debra Romantic-Boros, Asst. Pro Atty., Steubenville, for plaintiff-appellee.

James Kura, Ohio Public Defender, Kort Gatterdam, Asst. State Public Defender, Ohio Public Defender Com'n, Columbus, for defendant-appellant.

OPINION

DONOFRIO, Judge.

*1 This matter was previously before this court on direct appeal. On July 3, 1990, this court entered its affirmance of a jury verdict wherein defendant-appellant, Samuel Williams, was convicted of aggravated murder following a trial in the Jefferson County Common Pleas Court in June of 1988. The same attorneys which handled the trial and the previous appeal then filed an appeal with the Ohio Supreme Court. The Supreme Court dismissed the appeal on December 19, 1990.

On October 7, 1992, appellant, by and through new counsel, filed an application for delayed reconsideration based upon the Ohio Supreme Court's decision in State v. Murnahan (1992), 63 Ohio St.3d 60. Murnahan permits a delayed claim of ineffective assistance of appellate counsel. The basis of that application was appellate counsel's failure to assign as error certain "acquittal first" instructions that were given to the jury before they could consider a lesser included offense, a violation of the holding in State v. Thomas (1988), 40 Ohio St.3d 213, U.S. certiorari denied (1989), 493 U.S. 826. The holding in Thomas was announced subsequent to appellant's trial, but in time to raise the issue on appeal. Appellant's counsel did not raise the issue in appellant's first appeal.

The issue raised in this appeal centers on two instructions to the jury regarding the lesser included offense of murder. The first questioned instruction was given before the jury entered deliberations. The second questioned instruction was given the morning preceding the jury's second day of deliberations when the trial court gave amplified instructions as to how the jury should consider the lesser included offense of murder.

In appellant's first assignment of error, he contends:

"The trial court erred in instructing the jury that they must acquit appellant of aggravated murder before they could consider the lesser included offense of murder. Said error deprived appellant of his Ohio and United States constitutional rights to due process of law."

In appellant's second assignment of error, he contends:

"Appellant was deprived of his right to the effective assistance of trial and appellate counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section Ten of the Ohio Constitution when his trial counsel failed to object to an acquittal first instruction and the same counsel on appeal failed to raise the acquittal first issue."

Since this case is being considered by us pursuant to State v. Murnahan, supra, we must restrict our analysis to that portion of appellant's second assignment of error which

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claims a deprivation of effective assistance of appellate counsel. As such, the first assignment of error is overruled.

With the foregoing in mind, error by the trial court as claimed by appellant must be such that previous appellate counsel should have raised it in the original appeal of this action. Further, counsel's failure to do so must have resulted in prejudice to the appellant. We thus begin with first determining if the instructions at issue were in fact error.

*2 In State v. Thomas, supra, the Ohio Supreme Court referred to instructions wherein a jury is told that they must unanimously find a defendant not guilty of an offense before considering a lesser included offense as an "acquittal first" instruction. The Supreme Court then indicated in Thomas, at 219-220, that:

> "*** We reject the 'acquittal first' instruction approved by the court of appeals below because such an instruction encroaches on the province of the jury to decide questions of fact and to arrive at a verdict based on all the evidence before it and on all the various offenses on which it has been properly instructed.
> "The defendant's right to have the jury instructed on a lesser included offense is fundamental to providing defendant with a fair trial. *** Although the risk of coerced decisions may be present in any jury deliberation, *** the 'acquittal first' instruction exacerbates such risk."

Despite its holding in Thomas, the Supreme Court opted not to reverse the conviction of the defendant in that particular case. The instruction in question in the Thomas case reads:

> "'If you find that The State has proven beyond a reasonable doubt all of the essential elements of the crime of aggravated murder, then your verdict must be that the Defendant is guilty of aggravated murder; and you will not consider the lesser offense.
> "'However, if you find that The State has failed to prove beyond a reasonable doubt the element of prior calculation and design, then your verdict must be that the Defendant is not guilty of aggravated murder.
> "'You will then proceed with your deliberations and decide whether The State has proven beyond a reasonable doubt all of the essential elements of the lesser crime of murder.'" State v. Thomas, supra, at 220

The Supreme Court found that the above instruction did not expressly require a unanimous acquittal on the charged crime before the jury was permitted to consider the lesser included offense. The Supreme Court indicated that this instruction addresses possible disagreement by the jury on an element of the crime and a corresponding inability to reach a verdict of aggravated murder.

The Supreme Court went on to state that this instruction has negligible coercive potential because it speaks to the jury's inability to find, whether unanimously or not, a certain element of the greater offense. The court went on to affirm the conviction of aggravated murder while stressing that a better instruction would have been to incorporate the "inability to agree" language adopted by the court in its opinion.

The trial court's instructions that are first questioned in the present case are as follows:

> "Finally you may find that the Defendant is not guilty of both the charge of aggravated murder and the specification. Any of these verdicts reached by your body must be unanimous.
> "If you find that the State has failed to prove each and every element of the crime of aggravated murder as I have instructed you, you will then return a verdict of not guilty to that charge. At this point you will then continue to deliberate and determine whether or not the Defendant is guilty of the lessor (sic.) included charge of murder." (Tr. 760)

*3 In the present case, appellee, State of Ohio, contends that these jury instructions given after trial did not expressly require a unanimous "not guilty" verdict before

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consideration of the lesser included offense. Appellee contends that these instructions were very similar to the instructions given in the Thomas case, which were approved by the Supreme Court.

We agree with appellee that these instructions are very similar to the Thomas instructions. In reading both instructions, they are very close in wording and in how we would interpret them. According to Thomas, both are acceptable. Appellant emphasizes that the paragraph prior to the first instruction refers to the fact that "Any of these verdicts reached by your body must be unanimous." This reference was to several possible verdicts referred to prior to the instruction in question. We feel that this instruction when read in total with all of the other instructions given right after the trial, as in Thomas, did not expressly require a unanimous acquittal before considering the lesser included offense.

A review of this court's journal entry of November 13, 1992 permitting appellant's application for delayed reconsideration indicates that when this first instruction is read in total it does not create substantial grounds for relief.

> "If you find that the State has failed to prove each and every element of the crime of aggravated murder as I have instructed you, you will then return a verdict of not guilty to that charge. At this point you will then continue to deliberate and determine whether or not the Defendant is guilty of the lessor (sic.) included charge of murder." (Tr. 760)

As in Thomas, this instruction has "negligible coercive potential" because it speaks to the jury's inability to find, whether unanimously or not, all elements of the greater offense.

We are not persuaded that this instruction, which was given before the jury began deliberations, unduly prejudiced the appellant. Thus, we do not find prejudicial effect with this instruction although a better instruction would have been to incorporate the "inability to agree language" that Thomas adopted. Even though the instruction may have been somewhat confusing and ambiguous, as in Thomas, it is our finding that when read as a whole with the balance of instructions it is not prejudicial. Therefore, trial counsel was not ineffective in failing to object to it. Further, ineffective assistance of appellate counsel did not occur by appellate counsel failing to question this instruction on appeal.

The second instruction at issue was given on the morning of the second day of deliberations after the jury was unable to reach a verdict. The court instructed the jury that:

> "*** You are really into a situation of just determining in accordance with the instructions you received on reasonable doubt as to whether or not the State proved its case beyond a reason able (sic.) doubt against the defendant. And your possibilities are he is guilty of aggravated murder, if you don't agree on that and you are unanimous in that, they (sic.) you can decide if he is guilty of murder. If you agree that he is, you return a verdict of guilty of murder. If you don't think he is guilty of that and you are unanimous, return the two verdicts of not guilty." (Tr. 782)

*4 Appellee asserts that the second instruction can be read to require a unanimous "guilty" verdict or a unanimous indecision but does not require a unanimous "not guilty" verdict. We disagree.

We find that the second instruction is a violation of the acquittal first prohibition as set out in Thomas. Prior to the second day of deliberation, the trial court gave these amplified instructions on its own. In appellant's initial appeal, this court indicated that amplified instructions are frowned upon. Part of the reason for this is that they may sometimes be taken out of context or unduly emphasized.

This instruction clearly and expressly required a unanimous not guilty verdict prior to deliberating on the lesser included offense as prohibited by the Supreme Court's later released decision in Thomas.

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We must now consider whether the improper jury instruction would have required a reversal of appellant's conviction if initially brought up on appeal. As previously stated, we find that this instruction given by the trial court expressly required a unanimous acquittal on the charge of aggravated murder before the jury was permitted to deliberate on the lesser included offense of murder. Pursuant to the holding in Thomas, supra, and in accordance with the reasoning of the Second District's case of State v. Shaw (1990), 65 Ohio App.3d 821, such an instruction constitutes prejudicial error and therefore warrants a reversal. It has been stated that, "*** ordinarily it is prejudicial error to give an instruction which misstates the law ***." 5 Ohio Jurisprudence 3d (1978) 304, Appellate Review, Section 646.

Appellant contends that appellate counsel was ineffective in failing to raise the issue of ineffective assistance of trial counsel and in failing to raise the issue of the erroneous jury instruction on appeal. Because the decision in Thomas was not released until subsequent to the trial of appellant, ineffectiveness of trial counsel is not a meritorious issue. However, appellate counsel was ineffective in failing to raise the second jury instruction as an issue on appeal.

Thomas was decided by the Ohio Supreme Court on December 30, 1988. Appellant's conviction was journalized June 22, 1988. Notice of appeal was filed July 20, 1988. Due to the length of the transcript, it was not filed until May 31, 1989. Appellant received several extensions to file his brief and eventually filed same on October 24, 1989. Appellee filed its brief on November 22, 1989. Oral argument was heard April 17, 1990. This court's opinion was released July 3, 1990.

As can be seen, appellate counsel had ample time to become aware of the Thomas decision and its implications. Failure to raise error in regard to the second jury instruction was ineffective assistance of appellate counsel that resulted in prejudice to appellant. See Strickland v. Washington (1984), 466 U.S. 668. This omission by appellate counsel affected the result of appellant's first appeal. Therefore, appellant's second assignment of error is with merit.

*5 For the foregoing reasons, the judgment of the trial court is reversed and this cause remanded for further proceeding consistent with this opinion.

O'NEILL, P.J., concurs.

COX, J., concurs.

END OF DOCUMENT

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*456453 NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

STATE of Ohio Appellee
v.
Marlon **FLOWERS** Appellant

No. L-92-337.
Court of Appeals of Ohio, Sixth District, Lucas County.
July 10, 1998.

Julia R. Bates, prosecuting attorney, and Brenda Majdalani, for appellee.

Spiros Cocoves, for appellant.

OPINION AND JUDGMENT ENTRY

RESNICK, J.

**1 This case is before the court following our May 27, 1997 decision which granted appellant's application for reopening, pursuant to App .R. 26(B), based upon a claim of ineffective assistance of appellate counsel on direct appeal.

The pertinent facts are as follows. On September 9, 1991, appellant, Marlon Trent **Flowers**, was indicted on one count of felonious assault with a firearm and physical harm specification. The case was dismissed on October 7, 1991. During this time, appellant was being held in jail on the charge of drug abuse (case number CR91-6459). On October 17, 1991, appellant was sentenced to one year in prison for the drug abuse charge. He was granted fifty-one days credit for time served.

While serving his sentence for drug abuse on January 13, 1992, appellant was again indicted for felonious assault with a firearm and physical harm specification. The indictment was for the same offense appellant was indicted for in September 1991. Appellant was arrested for the offense on May 11, 1992. A trial was scheduled for June 16, 1992. On June 16, 1992, the trial date was continued to June 23, 1992. On June 23, 1992, the trial date was once again continued to July 14, 1992. On July 9, 1992, the trial date was continued for the last time until August 12; 1992. On August 13, 1992, a jury found appellant guilty as charged. He was sentenced to prison for not less than seven nor more than fifteen years in prison.

Pursuant to R.C. 2945.71(C), a person against whom a charge of felony is pending, such as felonious assault, shall be brought to trial within two hundred seventy days after his arrest. Each day the accused is held in jail in lieu of bail on the pending charge counts as three days for purposes of the speedy trial computation. R.C. 2945.71(E).

The issue before this court is whether or not appellant was brought to trial within two hundred seventy days in compliance with R.C. 2945.71. Appellant was initially indicted for felonious assault on September 9, 1991. The charge was dismissed on October 7, 1991. That period of time, twenty-eight days, is chargeable to the state. *State v. Bonarrigo* (1980), 62 Ohio St.2d 7, 402 N.E.2d 530. From October 7, 1991 until his reindictment on January 13, 1992, ninety-eight days elapsed. This time is not counted for purposes of R.C. 2945.71 as the charge of felonious assault was not pending. On May 11, 1992, appellant was arrested and placed in custody for the charge of felonious assault. At that point, one hundred nineteen days for purposes of R.C. 2945.71 had elapsed for a total of one hundred forty-seven days (28 + 119 = 147).

Appellant was in custody from May 11, 1992 until the day he actually went to trial on August 12, 1992 (93 days). In his application for reopening, appellant alleged that his counsel was ineffective in failing to show that appellant had been released from prison on the drug abuse charge prior to his arrest for felonious assault. On direct appeal, this court noted there was no evidence that appellant had been released in April 1992. The only evidence of appellant's incarceration status was the docket sheet showing that appellant had received a year sentence for drug abuse. Even after calculating the days appellant was credited for time served, there was no evidence before the court that he was not still in prison on the drug abuse charge. This court, relying on the validity of the trial court record, did not credit appellant with triple time during the period of May 11, 1992 to August 12, 1992, because appellant was not in custody solely on the pending charge of felonious assault. This interpretation led to the conclusion that appellant was brought to trial within two hundred seventy days (147 + 93 = 240).

**2. On April 14, 1997, appellant filed a *"pro se* application to reopen direct appeal pursuant to Ohio Rules of Appellate Procedure Rule 26(B)." Appellant argued that his appellate counsel was ineffective in failing to present pertinent documentation in support of his speedy trial argument. Appellant submitted documentation in support of his argument. In finding appellant's application well-taken, this court found the documentation to be "ambiguous" but stated that the "documentation nevertheless suggests appellant's claims *may* have merit." In other words, if it could successfully be shown that appellant was released from prison on the drug abuse charge on April 24, 1992, he would be entitled to use the triple count provision when calculating his incarceration

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time from May 11, 1992 until August 12, 1992 (93 X 3 = 279). This is because appellant would have been held solely on the pending charge of felonious assault. Application of the triple count provision would lead to the conclusion that appellant was not brought to trial within two hundred seventy days (147 - 279 = 426).

In granting appellant's application for reopening, this court was not ruling that appellant proved he had been released from prison on the drug abuse charge in April 1992. We merely acknowledged the possibility that appellate counsel had ignored crucial documentation or other evidence that may have changed the outcome of appellant's direct appeal. Rather than shedding some light on this "ambiguous documentation," the parties in their briefs have chosen to accept as fact that appellant was released on April 24, 1992.

We are therefore only left to review the documents appellant originally submitted in his application. The first document appellant submitted was from the Ohio Department of Rehabilitation and Correction. The document was titled "expiration of sentence." The document, dated April 24, 1992, acknowledged that appellant had successfully completed a prison sentence. Nothing in the document, however, identifies exactly what sentence appellant successfully completed. The other piece of documentation submitted by appellant was an arrest report showing that he was arrested for the charge of felonious assault on May 11, 1992. Once again, we cannot tell from this document whether or not appellant had been released from prison on the drug abuse charge on April 24, 1992.

Accordingly, appellant has not shown that his appellate counsel was ineffective and his sole assignment of error is found not well-taken. The court finds that substantial justice has been done the party complaining, and the judgment of the Lucas County Court of Common Pleas is affirmed. Costs assessed to appellant.

JUDGMENT AFFIRMED.

PETER M. HANDWORK, P.J., MELVIN L. RESNICK, J., JAMES R. SHERCK, J., CONCUR.

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*308390 NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

STATE of Ohio, Plaintiff-Appellee.
v.
Gordon C. NEWLIN, Defendant-Appellant.

No. 87AP-222.
Court of Appeals of Ohio, Franklin County.
Aug. 5, 1993.

Michael Miller, Pros. Atty., Patrick E. Sheera and Joyce S. Anderson, for appellee.

Dennis C. Belli, for appellant.

DECISION

ON MOTION FOR DELAYED RECONSIDERATION

DESHLER, Judge.

**1 Defendant-appellant, Gordon C. Newlin, has filed an application for delayed reconsideration of this court's decision in *State v. Newlin* (June 23, 1988), Franklin App. No. 87AP-222, unreported (1988 Opinions 2226), wherein this court affirmed judgments of the Franklin County Court of Common Pleas finding defendant guilty of aggravated murder and involuntary manslaughter and various other counts in the indictment unrelated to the issues now before the court. The trial court found the involuntary manslaughter count merged with the aggravated murder count and, therefore, did not sentence defendant on the former. Defendant was sentenced to life imprisonment for the aggravated murder of Laura Carter. Following this decision, appellant filed a *pro se* motion for reconsideration which was generally denied, but allowed to the extent the appellant was ordered to be resentenced regarding one count of conspiracy pursuant to R.C. 2023.01(F).

In *State v. Murnahan* (1992), 63 Ohio St.3d 60, the Ohio Supreme Court delineated a procedure for filing a motion for reconsideration after the normal time for filing for reconsideration had expired. A criminal defendant may raise a claim of ineffective assistance of appellate counsel by applying for "delayed reconsideration" of his direct appeal in the court of appeals where the alleged ineffective assistance of counsel occurred. App.R. 26(B) became effective July 1, 1993. The rule now sets forth a procedure mandated by *Murnahan*, under the heading, "Application for Reopening."

Bringing an application for delayed reconsideration has been a two-stage process. In the first stage, the court of appeals must determine based upon the defendant's application, affidavits and portions of the record before it, whether the defendant has set forth a colorable claim of ineffective assistance of appellate counsel and, if so, whether such ineffective assistance of counsel prejudicially affected the outcome of defendant's direct appeal. If the court of appeals determines that defendant has made the requisite showing, the court shall then reinstate defendant's direct appeal, commencing the second stage of the process.

Appellant now claims his original appellate counsel was ineffective for failing to bring the following new assignments of error:

"Assignment of Error No. 8:

"The common pleas court erred to appellant's prejudice in (1) overruling defendant-appellant's exception to the jury charge with respect to the inconsistency between count one of the indictment, aggravated murder of Laura Carter and count nine of the indictment, involuntary manslaughter of the same victim, (2) instructing the jury that it was permissible to return inconsistent verdicts of guilty of both aggravated murder and involuntary manslaughter in respect to one victim, (3) after the jury returned verdicts of guilty upon both aggravated murder and involuntary manslaughter in respect to the same victim, failing to direct the jury to deliberate further with instructions that it may return a guilty verdict of either aggravated murder or involuntary manslaughter, but not both, and (4) entering a judgment of conviction upon the aggravated murder guilty verdict.

**2 "Assignment of Error No. 9:

"The prosecution having failed to prove that defendant-appellant specifically intended to cause the death of Laura Carter, the common please [*sic*] court erred to defendant-appellant's prejudice in denying his motion for a judgment of acquittal as to count one of the indictment, aggravated murder, and in instructing the jury that defendant-appellant may be found guilty of aggravated murder if a gunshot accidentally caused the death of Laura Carter."

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To proceed on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was so deficient that it was unreasonable under prevailing professional norms. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688. *State v. Seiber* (1990), 56 Ohio St.3d 4, 11. A defendant must then show that " * * * there is a reasonable probability that but for [his] counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland, supra*, at 694. Applying this standard to the case before us, we are unable to conclude that defendant's appellate counsel was ineffective within the meaning of *Strickland*.

Defendant alleges that his appellate counsel was ineffective for failing to raise various claims of error relating to the court's instructions and acceptance of the verdicts returned by the jury. The defendant first complains that error should have been asserted as a result of the trial court instructing the jury on aggravated murder and in a separate court of the indictment for involuntary manslaughter. Additionally, defendant claims counsel should have asserted error based on the trial court's answer to a jury question that permitted a verdict of guilty to be returned for both aggravated murder and involuntary manslaughter arising from the same incident. The defendant, relying principally on this court's decision in *State v. Tanner* (Dec. 31, 1991), 91AP-263 and 91AP-651, unreported (1991 Opinions 6169), argues that the court's instructions on the two homicide related charges and the court's answer to a jury question, as well as the acceptance of the verdict, was an error as the two offenses are inconsistent. He further argues the jury should not have been permitted to consider the aggravated murder charge and involuntary manslaughter charge unless the latter was identified as a lesser included offense.

The defendant, among other charges, was indicted for aggravated murder, R.C. 2901.03(A) and for involuntary manslaughter, R.C. 2903.04(A). The state proceeded to trial on the theory of transferred intent, there being no dispute that the actual victim of the shooting that occurred, Laura Carter, was not the intended victim. The indictment for involuntary manslaughter arose from the claim the defendant's action resulted in the victim's death while committing a felony, felonious assault. The record clearly reveals the state wanted to prosecute the two offenses separately as opposed to conceding that involuntary manslaughter would be before the jury as a lesser included offense. It is well-settled that involuntary manslaughter is a lesser included offense of murder. See *State v. Rohdes* (1986), 23 Ohio St.3d 225 and *State v. Kidder* (1987), 32 Ohio St.3d 279. The state argued that the two offenses, aggravated murder and involuntary manslaughter were consistent from the standpoint the concept of transferred intent, necessary to the establishment of intent involving aggravated murder, did not apply to involuntary manslaughter. The trial court accepted this argument over objections of trial counsel. The concept of transferred intent can apply to aggravated murder, as affirmed in *State v. Richey* (1992), 64 Ohio St.3d 353. Since involuntary manslaughter is a lesser included offense of murder and the greater degree of homicide cannot be committed without committing the lesser of the offenses, conviction on both is not inconsistent. The consideration of an offense as a lesser included offense is succinctly stated in *Kidder, supra*, wherein the court stated:

**3 "Again, to clarify, the entire lesser-included-offense analysis, for purposes of R.C. 2945.74, is as follows: an offense may be a lesser included offense of another only if (i) the offense is a crime of lesser degree than the other, (ii) the offense of the greater degree cannot, as statutorily defined, ever be committed without the offense of the lesser degree also being committed, and (iii) some element of the greater offense is not required to prove the commission of the lesser offense. Even though so defined, a charge on the lesser included offense is not required, unless the trier of fact could reasonably reject an affirmative defense and could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense."

Therefore, the trial court's consideration of the two offenses under the facts in this case did not result in prejudicial error. This court's decision in *Tanner, supra*, involved a different factual context and is not dispositive of the decision in the case *sub judice*. Even if it would be deemed inconsistent, there is authority for permitting inconsistent verdicts on separate counts. As stated, in *State v. Adams* (1978), 53 Ohio St.2d 223:

"2. The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different couns [*sic*], but only arises out of inconsistent responses to the same count." (Citation omitted.) *Id.* at paragraph two of the syllabus.

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More importantly, the defendant has overlooked the impact of R.C. 2941.25(A), which states:

"(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of simular import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

As stated in *State v. Darga* (1985), 30 Ohio App.3d 54:

'However, R.C. 2941.25 has not been interpreted to mean that a person cannot be indicted or charged, tried, and found guilty of multiple offenses, even when they are allied offenses." (Citations omitted.) *Id.* at 56.

And as more specifically addressed in *State v. Kent* (1980), 68 Ohio App.2d 151, "[t]he allied offense statute merely provides that where allied offenses are present, the person can only be convicted of one of the offenses. *Conviction in this context means a judgment of conviction." Id.* at 154. (Emphasis added.) And, as stated in *State v. Henderson* (1979), 58 Ohio St.2d 171, a "conviction" is defined as more than a verdict or finding of guilty. *Henderson* states that a conviction means a combined occurrence of a plea or verdict and/or finding of guilty and the sentence imposed. Accordingly, a defendant may be prosecuted for and convicted of two similar offenses, but sentenced on only one conviction.

**4. While standing alone and in the manner it was answered, the trial court's response of "yes" to the jury's question of whether the jury could convict defendant of both aggravated murder and involuntary manslaughter was correct. While it was deserving of more explanation, we cannot conclude the answer given to the jury warranted the obvious necessity of a challenge by appellate counsel. For reasons already stated, the defendant was, under the facts presented, found guilty of both offenses and this is permissible considering the facts of this case, even though the jury was not instructed that involuntary manslaughter is a lesser included offense.

The defendant's other claim of ineffective assistance of appellate counsel is essentially a claim the trial court committed error by failing to dismiss the aggravated murder charge on motion for dismissal for insufficient evidence and for an error in instructing the jury erroneously that defendant could be found guilty of aggravated murder if a gunshot accidentally caused the death of Laura Carter. We do not find the court's jury instruction is literally as claimed by defendant and since the claim of failing to dismiss the aggravated murder count was considered in the defendant's original appeal, such issue is precluded by the doctrine of *res judicata*. The trial court's instructions on transferred intent were sufficient to avoid the application of the concept of "plain error." We cannot conclude that appellant's counsel's failure to raise either of these issues on appeal met the standards set forth in *Strickland, supra*. Thus, we find no merit in defendant's second assignment of error relating to ineffective appellate counsel.

The appellant has raised claims of ineffective assistance of appellate counsel for what amounts to a failure to advance claims of error that are without merit. Appellant has not shown prejudice or any conformity to the requirements established in *Strickland, supra*. In view of these circumstances, language from the case of *Engle v. Isaac* (1982), 456 U.S. 107, 102 S.Ct. 1558, is appropriate. " * * * We have long recognized, however, that the constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. * * * " *Id.* at 1575.

Based upon the foregoing, defendant's motion provides no substantive grounds for relief and, accordingly, defendant's application for delayed reconsideration is denied.

Motion for delayed reconsideration denied.

WHITESIDE and PETREE, JJ., concur.

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STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
)
Appellee)
)
v.)
)
TINA BORT)
)
Appellant)
)

C.A. NO. 96CA006597

JOURNAL ENTRY

This cause was heard upon appellant Tina Bort's motion to file an application to reopen instanter. This court granted appellant an extension of time to file her application to reopen, rendering the application due on August 25, 1997. Appellant filed the instant motion as well as an application to reopen, on September 8, 1997. This court notes that, in the application to reopen, appellant's current counsel ironically complains appellant's former counsel was ineffective because he failed to timely file documents with this court.

Upon consideration, the motion is granted.

John W. Reece
Judge

cc: Ivelisse Cruz, Assistant Public Defender, 8 East Long St., 11th Floor, Columbus, OH 43215.

Gregory A White, Prosecuting Attorney, 226 Middle Ave., Elyria, OH 44035.

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :

Plaintiff-Appellant, :

v. : CASE NO. 90-2287

ARNOLD R. MURNAHAN, :

Defendant-Appellee.

On Appeal from the Court of Appeals for Clark County, Ohio
Second Appellate District

BRIEF OF AMICUS CURIAE, ATTORNEY GENERAL OF OHIO

FILED
JAN 22 1991

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EXHIBIT

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ARGUMENT

Proposition of Law Number 1:

A CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IS NOT COGNIZABLE IN COLLATERAL POST-CONVICTION PROCEEDINGS PURSUANT TO R.C. 2953.21; SUCH A CLAIM MUST BE PRESENTED IN THE CHAIN OF DIRECT APPEAL, EITHER BY WAY OF A DIRECT APPEAL TO THE OHIO SUPREME COURT FROM THE JUDGMENT OF THE COURT OF APPEALS, OR ON AN APPLICATION FOR RECONSIDERATION IN THE COURT OF APPEALS PURSUANT TO OHIO APPELLATE RULES 26 AND 14(B). 4

Authorities Cited in Support of Proposition of Law No. 1:

28 U.S.C. Section 2254 4

Anderson v. Harless (1982), 459 U.S. 4 5

Granberry v. Greer (1987), 481 U.S. 129. 5

Castille v. Peoples (1989), 489 U.S. 346 5

Rose v. Lundy (1982), 455 U.S. 509 5

Ferguson v. Knight (6th Cir. 1987), 809 F.2d 1239. . . 5

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APPENDICES:

The Appendices attached to the State's Merit Brief are incorporated by reference herein.

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INTEREST OF AMICUS CURIAE

The Ohio Attorney General represents the State's interests in collateral attacks on criminal convictions which name as the respondent a state official, such as the warden of the correctional facility at which the petitioner is detained. This includes all Ohio prisoners' petitions for federal habeas corpus relief.

As explained herein, Ohio's procedural rules for handling claims of ineffective assistance of appellate counsel are important for determining the procedural posture of the same allegations in federal habeas corpus. The decision below indicates that at least some room for debate exists in Ohio as to the proper state procedural vehicle for raising claims of appellate ineffectiveness. To the extent Ohio procedural law is unclear, federal courts may hear such claims in the first instance, despite the refusal of Ohio courts to have reviewed them. This leads to a lack of respect for Ohio procedural requirements, both by federal courts and prospective federal litigants. Litigants aiming for federal habeas review have little incentive to obey Ohio procedural requirements, secure in the knowledge that the merits of their claims will be addressed by federal courts anyway.

Conversely, when Ohio procedural requirements are clear and evenhandedly applied, federal courts will respect them and refuse to entertain federal constitutional claims not previously presented to Ohio courts as required by Ohio procedure. Claims

defaulted for further Ohio review will be deemed defaulted for federal habeas review as well.

Therefore, this brief is filed to urge this Court to specify with particularity the Ohio remedies for ineffective assistance of appellate counsel, in order to insure that such claims will not rise up again, and be considered for the first instance, in federal habeas corpus.

STATEMENT OF THE CASE AND FACTS

This Office is in agreement with the Statement of the Case and Facts as set forth in the Appellant's Merit Brief.

ARGUMENT

Proposition of Law Number 1:

A CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IS NOT COGNIZABLE IN COLLATERAL POST-CONVICTION PROCEEDINGS PURSUANT TO R.C. 2953.21; SUCH A CLAIM MUST BE PRESENTED IN THE CHAIN OF DIRECT APPEAL, EITHER BY WAY OF A DIRECT APPEAL TO THE OHIO SUPREME COURT FROM THE JUDGMENT OF THE COURT OF APPEALS, OR ON AN APPLICATION FOR RECONSIDERATION IN THE COURT OF APPEALS PURSUANT TO OHIO APPELLATE RULES 26 AND 14(B).

This office consulted with and assisted the Clark County Prosecutor in briefing this appeal, and fully supports the prosecutor's position as detailed in his merit brief. This brief is therefore not intended to cover the same ground as the prosecutor has already thoroughly explored. Rather, the purpose of this brief is to stress the importance of a comprehensive decision in this appeal, from the viewpoint of post-conviction litigation once a case leaves the Ohio court system.

The procedural aspects of federal habeas corpus are dominated by the twin concepts of exhaustion of state remedies and waiver. Both have their roots in principles of federalism and comity, and both deal with the petitioner's failure to have given the state courts a fair opportunity to act on his claim before presenting the claim to the federal courts.

The exhaustion doctrine is codified at 28 U.S.C. Section 2254 (b) and (c), which has generally been interpreted to require a federal habeas claim first to have been fairly presented as a federal constitutional claim to the state's

highest court. See Anderson v. Harless (1982), 459 U.S. 4; Granberry v. Greer (1987), 481 U.S. 129. A claim which is presented using the wrong remedy is not fairly presented, because the state courts have not had a fair opportunity to act on it. Castille v. Peoples (1989), 489 U.S. 346. When a federal habeas petition contains an unexhausted claim which has not been forfeited in the state courts, the entire petition is ordinarily dismissed without prejudice to permit presentation of the claim to the state courts. Rose v. Lundy (1982), 455 U.S. 509. Otherwise, a claim which has not been fairly presented to the state courts, but cannot be re-raised under state law, is subject to a waiver analysis. See Ferguson v. Knight (6th Cir. 1987), 809 F.2d 1239, 1241-42; Meeks v. Bergen (6th Cir. 1984), 749 F.2d 322, 324.

Ordinarily, a habeas petitioner is not entitled to have a federal court review his claim when it was "not resolved on the merits in the state proceeding due to [petitioner's] failure to raise [it] there as required by state procedure." Wainwright v. Sykes (1977), 433 U.S. 72, 87. To hold otherwise would deter the orderly presentation of claims and encourage "sandbagging" in state court, defeat the finality of criminal litigation, and undermine considerations of comity and federalism. Id., 433 U.S. at 88-90; see also, Engle v. Isaac (1982), 456 U.S. 107; Henderson v. Kibbe (1977), 431 U.S. 145. The Sykes standard applies to claims that were not, but could have been, raised on appeal in the state courts. Murray v. Carrier (1986), 477 U.S. 478; Ewing v. McMackin (6th Cir. 1986), 799 F.2d 1143, 1150-51.

A question of waiver requires a four-part analysis, as summarized in Maupin v. Smith (6th Cir. 1986), 785 F.2d 135, 138-39:

1) A procedural default occurred when the petitioner failed to comply with a state procedural rule;

2) If the claim was presented at all, the state courts actually enforced the procedural rule barring the claim;

3) The state procedural rule is an "adequate and independent" ground to bar the claim; and

4) The petitioner has not shown sufficient cause for the procedural default, and prejudice as a result.

"Cause" for failing to have raised a claim on the first appeal of right consists of the novelty of the claim, some sort of "external impediment," or ineffective assistance of appellate counsel. However, to serve as "cause" for having defaulted a claim on state appeal, ineffective assistance of appellate counsel must first have been exhausted as an independent claim in the state courts. Murray v. Carrier.

When a federal habeas petitioner wants to raise a federal habeas claim that should have been raised on direct state appeal but was not, he most commonly cites as "cause" the ineffective assistance of appellate counsel. This, in turn, triggers a federal inquiry, within the above framework, whether an independent claim of ineffective assistance of appellate counsel has itself been exhausted or waived in state court.

The first stage of either an exhaustion or a waiver analysis requires the federal court to determine what the correct Ohio remedy is. Presently, the federal courts have

struggled with this question. After a series of inconsistent unreported district court decisions, the Sixth Circuit purported to settle the question in Manning v. Alexander (6th Cir. 1990), 912 F.2d 878.

Prior to this Court's decisions in Manning v. Alexander (1990), 50 Ohio St. 3d 127, and In re Petition of Brown (1990), 49 Ohio St. 3d 222, the district court had found Manning's claim of ineffective assistance of appellate counsel, which he had presented by way of an Ohio post-conviction petition, to be unexhausted because post-conviction was the wrong remedy, and Ohio habeas corpus appeared to be the correct one. Manning appealed this decision to the Sixth Circuit. Simultaneously, he filed an Ohio habeas petition which was dismissed by this Court in Manning v. Alexander. Then, on Manning's appeal from the district court decision, the Sixth Circuit reversed.

The Sixth Circuit reviewed several Ohio appellate decisions holding appellate ineffectiveness claims not to be cognizable in post-conviction proceedings, and several others which had apparently considered such claims where the cognizability issue was not raised. The court relied most heavily on State v. Howard (1989), 42 Ohio St. 3d 18, an appeal from the grant of post-conviction relief in which this Court, without addressing the cognizability question, had found appellate counsel to have been ineffective for failure to have challenged an Allen charge. The Sixth Circuit concluded that this Court would never had exercised jurisdiction over the Allen charge claim unless

ineffective assistance of appellate counsel were cognizable in post-conviction proceedings under Ohio law. Therefore, a claim of ineffective assistance of appellate counsel would be deemed exhausted for federal purposes if presented to this Court on an appeal from denial of post-conviction relief.

There are all kinds of problems with the Sixth Circuit's analysis in Manning, not the least of which were that court's failure to realize that Ohio courts do not usually consider issues that are not raised by either party, and the complete failure to apply principles of res judicata to Manning's claim. Worst of all, Manning creates a mismatch between Ohio and federal law. As matters now stand, litigants who raise appellate ineffectiveness claims under the wrong Ohio procedure in a majority of Ohio appellate districts have nonetheless exhausted their claims for federal purposes. Litigants who raise such claims at the earliest possible opportunity under Ohio procedure may or may not have exhausted their claims for federal purposes.

The federal-state mismatch is particularly problematic in death penalty cases, where the prisoner will typically assert in Ohio post-conviction proceedings that appellate counsel was ineffective for failure to raise a plethora of claimed trial errors. These claims are almost uniformly frivolous. Yet, such claims tend to complicate and delay Ohio post-conviction proceedings even if they are not addressed on cognizability grounds. But under Manning they are now deemed exhausted for

federal review, and will be reviewed on the merits there, appreciably prolonging federal habeas review in capital cases. Much of the incentive for raising such claims will be removed by requiring the death penalty appellant to raise such claims with new counsel before this Court on direct appeal.

Part, but not all, of the mismatch will be resolved by this Court's having answered, in the narrowest possible sense, the question certified to it. The federal courts are not constitutionally competent to prescribe matters of Ohio procedure. Henry v. Mississippi (1965), 379 U.S. 443, 447; McBee v. Grant (6th Cir. 1985), 763 F.2d 811, 815-16. The Sixth Circuit did not attempt to prescribe Ohio law in Manning, but simply endeavored to figure out what it was, for purposes of applying federal rules of exhaustion and waiver. If this Court concludes, as it must, that Manning incorrectly decided Ohio law, the effect would be to "overrule" Manning.

Even so, a narrow decision would not necessarily result in federal respect for Ohio procedural rules governing appellate ineffectiveness claims, unless this Court, in addition to holding what the remedy is not, also specified what the remedy is. If a federal habeas petitioner has failed to raise his ineffectiveness claim on direct appeal to this Court, but raises it in federal habeas corpus, the federal court may yet entertain his claim on the merits if, at the third stage of the Maupin analysis, it concludes the Ohio procedural rule not to be "adequate and independent."

Federal courts will not enforce a state procedural rule to preclude a litigant's federal claim unless that rule is both clearly announced and regularly enforced. Johnson v. Mississippi (1988), 486 U.S. 578; Hathorn v. Lovorn (1982), 457 U.S. 255, 262-65; Barr v. City of Columbia (1964), 378 U.S. 146, 149-50; Henry v. Mississippi, 379 U.S. at 448 n.3; see also, Reynolds v. Ellingsworth (3rd Cir. 1988), 843 F.2d 712, 719, cert. denied, 488 U.S. 960. "Exceptions" to the state rule, such as plain error, do not render the general "rule" unenforceable. Dugger v. Adams (1989), 489 U.S. 401, ___ n.6; Prihoda v. McCaughtry (7th Cir. 1990), 910 F.2d 1379, 1384-85; Meadows v. Legursky (4th Cir. 1990), 904 F.2d 903, 906-07, cert. denied, 111 S. Ct. 523; Hill v. Black (5th Cir. 1989), 887 F.2d 513, 516-17. The "adequacy" requirement merely protects the federal litigant against unanticipable or arbitrary applications of state procedural rules seemingly manufactured for the occasion.

We are of the opinion that the Ohio rules have been "adequate" ever since State v. Roberts (1982), 1 Ohio St. 3d 36, plainly announced that res judicata requires new claims arising in the court of appeals to be raised on further appeal to this Court, and since State v. Benton (1971), 27 Ohio St. 2d 87, strongly implied that the post-conviction statute does not encompass claims not implicating the judgment of the trial court. And enforcement of these rules looks less consistent than it is, when viewed from the viewpoint of the Ohio system as a whole, rather than the viewpoint of individual appellate

districts. Nonetheless, the impression remains that if the federal courts misinterpreted Ohio law in Manning, they may not hold federal habeas litigants to a higher standard of prescience until this Court definitively lays out the law.

To answer the question certified solely in terms of whether the post-conviction statute admits of appellate ineffectiveness claims may tell prospective litigants what the remedy is not, but not necessarily what it is. If the proper remedy is not defined, the way remains open for inconsistent and unexpected results in Ohio's appellate courts, and further disrespect for Ohio's procedural requirements on the federal level--and among prospective federal litigants. If prisoners have any incentive whatever to bring actions under the wrong Ohio remedies, the result must be wasteful to the resources of Ohio courts and prosecutors.

Conversely, if this Court addresses the interplay between the scope of the Ohio post-conviction statute and the doctrine of res judicata, and spells out how appellate ineffectiveness claims must be brought under a variety of circumstances, no one will have any excuse for mistaking his remedies for such a claim, and Ohio appellate courts will have adequate guidance for consistent application of the principle that claims of error must be raised at the earliest opportunity. Ohio procedural rules will then be "adequate" for federal purposes, because they will be well-defined and consistently enforced. Federal habeas

corpus review will then compliment state procedural rules by refusing to address claims not timely asserted as required by Ohio procedure.

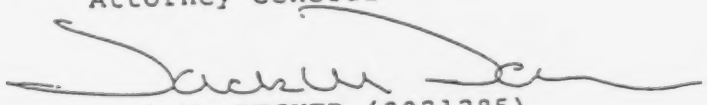
If Ohio remedies are well-defined, prospective federal litigants will have no incentive but to raise their claims at the earliest possible opportunity. All Ohioans' interests will be well-served by such a result. Meritless claims can be disposed of quickly. If a claim has merit, quick corrective action is possible, and the guilty will not go free because the passage of time has made retrial impracticable.

CONCLUSION

For the reasons stated in the State's Merit Brief and herein, the Court should reverse the decision below. In so doing, the Court should prescribe with particularity a prisoner's remedies when he claims the ineffective assistance of appellate counsel.

Respectfully submitted,

LEE FISHER
Attorney General



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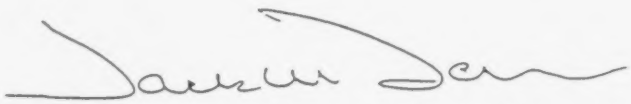
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amicus Curiae has been forwarded to David E. Smith, Assistant Prosecuting Attorney for Plaintiff-Appellant, 50 East Columbia Street, Springfield, Ohio 45502, and also on Barbara A. Farnbacher, Assistant Ohio Public Defender for Defendant-Appellee, 8 East Long Street, 11th Floor, Columbus, Ohio 43266-0587, via the U.S. Mail, postage prepaid this 22nd day of January, 1991.



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*27 165 F.3d 27

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 10, FI CTA6 Rule 24 and FI CTA6 App. III, IOP 22 for rules regarding the publication and citation of unpublished opinions.)

William H. FOSTER, Petitioner-Appellant,
v.
Ronald D. EDWARDS, Warden, Respondent-Appellee.

No. 97-4218.
United States Court of Appeals, Sixth Circuit.
Sept. 23, 1998.

Before MERRITT, JONES, and SILER, Circuit Judges.

ORDER

William H. Foster, an Ohio state prisoner, appeals pro se a district court judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254, as barred by the one-year statute of limitations in 28 U.S.C. § 2244(d). This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R.App. P. 34(a).

In 1994, a jury convicted Foster of murder and aggravated assault, both with gun specifications. He was sentenced to eighteen years to life imprisonment, plus six years on the specifications. His direct appeal was denied by the Ohio Court of Appeals and by the Ohio Supreme Court; the latter decision was filed on November 15, 1995. Foster also filed an application to reopen his direct appeal, pursuant to Ohio R.App. P. 26(B). That application was denied by the Ohio Court of Appeals and the Ohio Supreme Court; the latter decision was filed on June 5, 1996.

On May 1, 1997, Foster mailed to the district court an application to proceed in forma pauperis and his habeas corpus petition. The court received these documents on May 12. The motion for pauper status was denied on May 27, Foster paid the filing fee on June 6, and the petition was stamped filed on August 14, 1997. The district court sua sponte dismissed the petition as barred by the one-year statute of limitations in 28 U.S.C. § 2244(d). The court construed the petition as having been filed on the date of mailing. However, it did not consider whether the pendency of the appeal of the denial of the application to reopen should affect the running of the statute. The district court subsequently denied Foster's motion for reconsideration, addressing the issue of the application to reopen and finding that it did not affect the finality of the judgment of conviction.

In this timely appeal, the parties have briefed only the issue of whether the petition was barred by the statute of limitations. This court reviews the district court's conclusions in a habeas corpus proceeding de novo. *Levine v. Torvik*, 986 F.2d 1506, 1512 (6th Cir.), *cert. denied*, 509 U.S. 907, 113 S.Ct. 3001, 125 L.Ed.2d 694 (1993).

Initially, the parties debate in their briefs when this petition should be considered to have been filed. This court has recently addressed a similar issue in the context of a Title VII action. In *Truitt v. County of Wayne*, 148 F.3d 644, 648 (6th Cir.1998), the court held that the statute of limitations was tolled during the pendency of a motion for pauper status, until such time as the order denying the motion was presumptively received. The plaintiff then must pay the filing fee before the statute runs. Applying that holding to these facts, the statute would have been tolled from May 1, when Foster mailed the motion, until May 30, when he presumptively received the order denying it. The record shows that his prison account was debited for the filing fee on June 6, which would therefore become the filing date. With that background, it must still be determined if this petition was barred.

Under § 2244(d)(1)(A), the statute of limitations begins to run on the date on which the judgment became final by the conclusion of direct review. The district court concluded that the judgment in this case became final on November 15, 1995, when the Ohio Supreme Court denied Foster's direct appeal. However, we conclude that Foster's application to reopen his direct appeal should figure into the calculation of the running of the statute in some manner. Either the application to reopen rendered the judgment nonfinal until it was resolved on June 5, 1996, a proposition the district court rejected without citation to any authority, or it should count as a collateral review of the judgment which tolls the running of the statute under § 2244(d)(2), an option which the district court apparently did not consider. In either case, the petition under review was filed within one year of the pertinent date, June 5, 1996, considering that the statute was tolled during the pendency of the motion for pauper status.

*27_ Accordingly, the district court's judgment dismissing this petition as barred by the statute of limitations is vacated, and the case is remanded for consideration on the merits. Rule 9(b)(3), Rules of the Sixth Circuit.

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No. 00-228

In The Supreme Court Of The United States

MARGARET A. BAGLEY, WARDEN,
Petitioner,

v.

FREDERICK WHITE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In The Supreme Court Of The United States

No. 00-228

MARGARET A. BAGLEY, WARDEN,
Petitioner,

v.

FREDERICK WHITE,
Respondent.

REPLY BRIEF FOR THE PETITIONER

The State of Ohio seeks review of a Sixth Circuit decision that ordered Ohio to provide effective and free legal services to all state prisoners who want to challenge the work of their original appellate lawyers once the first-appeal-of-right is finished. According to the court of appeals, the Sixth and Fourteenth Amendments compel that result, even though this Court has long held that a state prisoner's constitutional right to counsel ends once he wins or loses his first-appeal-of-right in the state appellate courts. He is free later to challenge his conviction, his sentence, or the work of his original trial or appellate lawyers, but the State has never been obligated – until now – to provide a lawyer to help him do so.

Respondent White devotes much of his brief in opposition to questions surrounding the adequacy of the

procedural deadline for raising ineffective-assistance-of-appellate-counsel claims in Ohio's state courts. He failed to meet that deadline, but now argues that he was not obligated to do so, because (he claims) Ohio's rule is not regularly followed by the State's courts.

Yet any questions about the adequacy of the state procedural bar that White failed to meet are irrelevant to the question presented here. Certainly, this Court need not address the adequacy issue to resolve the question presented, which is quite distinct from the adequacy issue. The Sixth Circuit itself did not resolve the adequacy question, *see* Pet. App. at 16a ("In any event, we need not focus on whether the good cause exception to Rule 26(B) constitutes an independent and adequate state ground . . . "), and White remains free to raise that issue on remand from this Court once the separate and important question that we raise has been resolved.

If the 90-day deadline in Ohio Appellate Rule 26(B) is inadequate because (as White claims) Ohio's intermediate appellate courts have irregularly applied the rule's "good cause" exception to the 90-day deadline – and we think it is certainly adequate, for the Ohio Supreme Court has *never* found good cause for *any* prisoner's failure to meet that rule's deadline – the rule can be revised, and its enforcement tightened in Ohio's appellate courts. But the question presented here is much broader, for in light of the Sixth Circuit's holding, the States now have a new constitutional obligation to provide effective post-appeal lawyers to their prisoners. More than a simple matter of a flexible or inflexible procedural deadline, the holding of the Sixth Circuit – and, in turn, the question presented – goes to the very heart of the States' duty under the Sixth Amendment to ensure that prisoners are effectively represented in criminal

cases. When does that duty end: once the first-appeal-of-right is finished – as both state and federal courts have always said – or later, only after every prisoner has been given a second free and effective appellate lawyer to challenge the work of his first one? That critically important constitutional question stands apart from any ancillary question about the adequacy of Ohio's 90-day deadline for raising ineffective-assistance claims.[1]

Turning to the merits of the question presented, respondent White simply says that legal challenges to appellate counsel's effectiveness must be raised as part of the direct appeal process in Ohio, rather than in a post-conviction proceeding. That response does not address the constitutional issue that we raise – and that the Sixth Circuit resolved – for no one disputes that Ohio's rules specify a particular place and time for raising appellate-ineffectiveness claims in the State's courts. The issue, rather, is whether the State must provide *counsel* to its prisoners when they raise that type of claim in whatever forum the State requires.

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[1] White's statement that "Rule 26(B) was not in effect until two years after Mr. White filed his application to reopen in the court of appeals" (Br. in Opp. at 6) – thereby suggesting that he had no obligation to follow that rule's deadline in 1993-94 – not only runs counter to the scores of Ohio appellate and supreme court decisions in which that rule was applied during that time period, but runs counter to the facts of his own case as well. Both the Ohio court of appeals and supreme court found that White should have, but did not, comply with the Ohio rule's 90-day deadline for raising his ineffective-assistance-of-appellate-counsel claim, *see* Pet. App. at 44a-45a, 48a-51a, and the federal magistrate judge and the district court agreed, *see* Pet. App. at 26a, 37a-40a. Indeed, even the Sixth Circuit agreed with us on this point, explaining that "there was an applicable rule in place and . . . White failed to follow it." Pet. App. at 13a.

White does not confront that issue, nor show why this case is a poor vehicle for resolving it.

The Sixth Circuit's published decision squarely holds that the Sixth Amendment imposes on Ohio (and presumably all other States) an obligation to provide free and effective post-appeal lawyers to those prisoners who have lost in their first-appeal-of-right. Whatever label respondent White (or any State) gives to that process – whether post-appeal, or post-conviction or direct appeal – surely the constitutional obligation does not vary from State to State. If, as has always been true, the State's obligation to provide counsel ends when the state appellate court affirms the prisoner's conviction and sentence in the first-appeal-of-right, then no different reading of the Sixth Amendment should apply in Ohio or in the Sixth Circuit. If instead, the Sixth Circuit has correctly held that States must now provide "constitutionally-mandated counsel," Pet. App. at 19a, to prisoners even many years after the first-appeal-of-right has ended, then many state prisoners across the country are being deprived of that constitutional right, and their entitlement to it ought not turn on the particulars of any given State's procedures for raising post-appeal challenges to appellate counsel's effectiveness.[2]

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[2] White's view that "claims of appellate ineffectiveness . . . may only be asserted in proceedings that are part of a first, direct appeal of right," (Brief in Opp. at 14), not only stands at odds with Ohio's rules, *see* Ohio App. Rule 26(B) (Pet. at 3) (explaining that a prisoner's challenge to the work of his appellate lawyer can only begin after "journalization of the appellate judgment" affirming the prisoner's conviction and sentence in the first-appeal-of-right), but also would require each prisoner's appellate lawyer in a first-appeal-of-right to argue his or her own ineffectiveness. Of course, neither Ohio nor any other State requires such a counterintuitive procedure.

The point of our question is *not* the label that Ohio or any other State attaches to its procedure for raising ineffective-assistance-of-appellate-counsel claims in state court. No doubt, some States direct prisoners to file those claims in state appellate courts, while other States direct prisoners to do so in state trial courts. Yet, regardless of the label attached to the procedure, or the court in which prisoners may raise such a claim, the critical point here is that no State – until now – has ever had to provide a free and constitutionally-effective lawyer to its state prisoners once the first-appeal-of-right ended.

In White's case, his first-appeal-of-right ended in 1991, when the state court of appeals issued its decision in his case. He could then have continued the direct appeal process by seeking discretionary review of the appellate court judgment in Ohio's supreme court and then in this Court, but while either of those later proceedings (which he did not pursue) would have been properly designated part of White's *direct appeal*, neither one could appropriately be described as part of the his *first-appeal-of-right*, and in neither of them did he enjoy a Sixth Amendment right to counsel.

Likewise, under Ohio's rules (like the rules in other States), White was free to raise an ineffective-assistance-of-appellate-counsel claim in the State's courts once his first-appeal-of-right ended in 1991. But neither Ohio nor any other State has ever found in the Sixth Amendment any obligation to provide a free and constitutionally-effective lawyer to help a prisoner like White raise such a claim, whether in a direct appeal or in post-conviction, any more than they have seen an obligation in the Sixth Amendment to provide counsel at the other stages of a direct appeal that follow the first-appeal-of-right. The critical point is that counsel is only constitutionally mandated during the first-

appeal-of-right, and once that ends, the prisoner is on his own for legal representation, whether in the direct appellate process, or in state post-conviction proceedings.

We are certainly not "asking this Court to . . . force Ohio to create a review process that is not required or even contemplated by the . . . Constitution." (Br. in Opp. at 16.) Indeed, we seek quite the opposite, for we ask only that longstanding constitutional principles be retained. It is the Sixth Circuit that has created a new process, though respondent White oddly contends that the judgment below "accorded . . . respect" (Br. in Opp. at 19) to Ohio's rules. Though Ohio's courts have never seen in the State's rules – or, more importantly, in the Constitution – any requirement that prisoners receive two rounds of free and effective appellate lawyers, and though no other state or federal court of which we are aware has ever imposed such an obligation on the States, the court below has now ordered Ohio and other States to begin providing a new round of free and effective appellate lawyers to challenge the work of each prisoner's original appellate lawyer. By directing that any prisoner (like White) may now undo his state-court conviction if he did not receive free and constitutionally-effective legal assistance after losing his first-appeal-of-right, the court of appeals has undercut the important interests in finality and comity that ought to guide federal courts in habeas cases.

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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